Supreme Court, U. S.
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No. 79-488

IN THE

# Supreme Court of the United States

**October Term, 1979**

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Respondent,*

v.

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC.,

and

WEST COAST TELEPHONE COMPANY OF CALIFORNIA, INC.,
*Petitioners,*

and

LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Respondent,*

v.

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC.,
and
WEST COAST TELEPHONE COMPANY OF CALIFORNIA, INC.,
*Petitioners,*
and
LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

General Telephone Company of the Northwest, Inc. and its subsidiary, West Coast Telephone Company of California, Inc., petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The June 27, 1979 opinion of the court of appeals (App. A, *infra*) is reported in 599 F.2d 322 (9th Cir. 1979). The report and recommendation issued by the United States magistrate on November 11, 1977 (App. B, *infra*), affirmed by the district court (App. C, *infra*), is not officially reported, but is in 16 FEP Cases 476 (W.D. Wash. 1977).

## JURISDICTION

The opinion of the court of appeals was filed June 27, 1979. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission must comply with the requirements of Rule 23 on class actions when it brings suit on behalf of a class under Section 706 of Title VII of the Civil Rights Act of 1964, 78 Stat. 259, as amended (42 U.S.C. §2000e-5).

## STATUTES INVOLVED

Section 706 of Title VII, Civil Rights Act of 1964, 78 Stat. 259, as amended, 42 U.S.C. § 2000e-5 (App. D, *infra*).

Rule 23 of the Federal Rules of Civil Procedure (App. E, *infra*).

## STATEMENT

The plaintiff, Equal Employment Opportunity Commission (EEOC or Commission), filed suit in United States District Court, Western District of Washington, on April 11, 1977, against defendants General Telephone Company of the Northwest, Inc. and its subsidiary, West Coast Telephone Company of California, Inc. (hereinafter referred to collectively as GTNW), and defendant Local Union No. 89, International Brotherhood of Electrical Workers (Union or IBEW). The complaint stated that the action was "authorized and instituted pursuant to Section 706(f)(1) and (3) of Title VII, Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e *et seq.* (Supp. II, 1972)." The complaint was precipitated by charges filed with the EEOC under Section 706 by four female employees of GTNW. The Commission, however, did not limit the relief it sought to the four charging parties. Instead the com-



plaint, as amended on August 1, 1977, alleged that GTNW discriminated against women throughout the company with regard to maternity leave, access to craft jobs, and opportunities for promotion to managerial positions. The complaint sought broad relief, including damages, for all purported discriminatees affected by the allegations.

The EEOC did not allege in the original complaint or in the amended complaint that this was a class action in accordance with Rule 23 of the Federal Rules of Civil Procedure. Furthermore, no action was taken to have the case certified as a class action in accordance with Rule 23. On August 15, 1977, however, the EEOC moved "the Court for an order bifurcating the issue of *class* liability from the issue of individual damages pursuant to Rule 42(b), Fed. R. Civ. Proc." (emphasis added). Also on August 15, 1977 pursuant to 42 U.S.C. §2000e-5(f)(5), the court ordered the action referred to a United States magistrate.

On September 16, 1977, GTNW filed a motion to dismiss the class action aspects of the case. The magistrate issued a Report and Recommendation on November 11, 1977, in which he concluded that the EEOC did not have to comply with Rule 23, rejecting the opposite conclusion of the Court of Appeals for the Fifth Circuit in *EEOC v. D. H. Holmes*, 556 F.2d 787 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978). The district court affirmed the magistrate's report but permitted an interlocutory appeal to the Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §1292(b), which the court of appeals accepted.

The court of appeals, on June 27, 1979, through the district court judge sitting by designation, affirmed the district court conclusion that the EEOC did not have to com-

ply with Rule 23. It noted that there was no indication in 42 U.S.C. §2000e-5(f)(1) that the EEOC must qualify as a class representative when it sues on behalf of a class, but on the other hand observed that there was no provision in the statute or the Federal Rules of Civil Procedure exempting the Commission from the requirements of Rule 23. The court felt that the legislative history likewise failed to express clearly an intention that the EEOC either must comply with, or that it is exempted from, the class action certification requirement.

The court then commented that the EEOC is a public agency "charged with the vindication of public policy, not merely with the enforcement of private rights," 599 F.2d at 330, App. A at A-16, which petitioners had argued was a principle related to the Commission's "standing" to bring a broad-based action, but unrelated to the question as to the applicability of Rule 23. See note 3, *infra*. Although the court acknowledged that the Fifth Circuit in *D. H. Holmes* had previously concluded that when the EEOC brings a class action under § 706, it does so subject to Rule 23 just as the private litigant in whose place it stands, the Ninth Circuit disagreed that Rule 23 should apply to a § 706 action brought by the Commission. Declaring that the Attorney General does not need to comply with Rule 23 in a pattern and practice suit under § 707, the court of appeals agreed with the report of the magistrate that it should not apply a different rule with respect to § 706 actions "in view of the seemingly identical nature of the two sections." 599 F.2d at 331, App. A at A-18.

The court concluded that through the use of the broad equitable powers vested in the federal courts under §706(g), 42 U.S.C. § 2000e-5(g), courts could provide equitable



relief on a case-by-case basis to remedy the problems arising by not complying with Rule 23. The court then held that because compliance with Rule 23 by the EEOC was not expressly mandated by either Rule 23 itself or the 1972 amendments authorizing the EEOC to bring a civil suit under § 706, the petitioners' motion to dismiss the class action aspects of this suit would be denied.

## REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the Ninth Circuit in *EEOC v. General Telephone Company* is in direct conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *EEOC v. D. H. Holmes Company, Ltd., supra.* Thus, there is a split among the only two circuit courts of appeals to have decided the issue. Under U.S. Supreme Court Rule 19, 28 U.S.C., a court of appeals decision in conflict with the decision of another court of appeals on the same matter is one of the considerations noted by the Supreme Court in determining whether to review a judgment.

2. There is also a split among the approximately 20 district courts which have considered the issue,[1] as well

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1. District court decisions in which Rule 23 has been held to apply to §706 actions include: *EEOC v. Westinghouse Electric Corp.*, 20 FEP Cases 120 (M.D. N.C. 1979); *EEOC v. Delaware Trust Co.*, 18 FEP Cases 1521 (D. Del. 1979); *EEOC v. Page Eng'r Co.*, 17 FEP Cases 1638 (N.D. Ill. 1978); *EEOC v. Akron Nat'l Bank & Trust Co.*, 78 F.R.D. 684 (N.D. Ohio 1978); *Niedhardt v. D. H. Holmes Co.*, 13 FEP Cases 449 (E.D. La. 1976), *aff'd, EEOC v. D. H. Holmes Co.*, 556 F.2d 787 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978); and *EEOC v. Continental Oil Co.*, 393 F. Supp. 167 (D. Colo. 1975), *aff'd on other grounds*, 548 F.2d 884 (10th Cir. 1977). *See also EEOC v. Datapoint Corp.*, 12 FEP Cases 1133 (W.D. Tex. 1975), *aff'd in part*, 570 F.2d 1264 (5th Cir. 1978).

District court decisions in which Rule 23 has been held not to apply to

[Footnote continued on page 6.]

as among the commentators who have addressed it.[2] This issue is a matter of nationwide importance which must be resolved because it affects the scope and procedure of every action brought by the EEOC on a class basis, which in turn are the majority of such actions brought by the EEOC. The issue is a preliminary matter which must be resolved initially and it affects the subsequent course of each case in discovery, settlement, damages and otherwise. Since the courts of appeals for the two largest circuits have split on the issue, until the matter is resolved there will be confusion in the majority of trial courts faced with the problem. The split in the district courts and the courts of appeals on this important question of federal law makes it essential that the United States Supreme Court settle the issue now.

There are additional reasons for reversing the decision. If the court of appeals decision is not reversed, it will enable the EEOC to seek class type relief without fullfilling the precise requirements of the class action rule, and it will greatly expand the scope of these actions and the attend-

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§706 actions include: *EEOC v. Bumble Bee Seafoods,* 19 EPD ¶9160 (D. Ore. 1979); *EEOC v. Stroh Brewery,* 19 EPD ¶9226, 19 FEP Cases 1099 (E.D. Mich. 1979); *EEOC v. Singer Controls Co. of America,* 18 FEP Cases 309 (N.D. Ohio 1978); *EEOC v. Raymond Metal Prods. Co.,* 17 FEP Cases 206 (D. Md. 1978); *EEOC v. Schlueter Mfg. Co.,* 17 FEP Cases 53 (E.D. Mo. 1978); *EEOC v. Whirlpool Corp.,* 16 FEP Cases 932 (N.D. Ind. 1978); *EEOC v. General Tel. Co.,* 16 FEP Cases 476 (W.D. Wash. 1977); *EEOC v. Pinkerton's Inc.,* 14 FEP Cases 1431 (W.D. Pa. 1977); *EEOC v. CTS,* 13 FEP Cases 852 (W.D. N.C. 1976); *EEOC v. Vinnell-Dravo-Lockheed-Manning,* 417 F. Supp. 575 (E.D. Wash. 1976); *Stuart v. Hewlett-Packard Co.,* 66 F.R.D. 73 (E.D. Mich. 1975); and *EEOC v. Lutheran Hosp.,* 10 FEP Cases 1177 (E.D. Mo. 1974).

2. Compare Bumpass, *The Application of Rule 23 of the Federal Rules of Civil Procedure to Actions Brought by the Equal Employment Opportunity Commission,* 29 Case W. Res. L. Rev. 343 (1979), *with* Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of EEOC v. D. H. Holmes Co.,* 28 Syracuse L. Rev. 741 (1977).



ant discovery without the appropriate guidelines of Rule 23. Further development of the reasons for reversal of the Ninth Circuit decision are highlighted below and are developed more fully in the briefs of petitioners and *amicus curiae* below, the Fifth Circuit decision noted and in Bumpass, *The Application of Rule 23 of the Federal Rules of Civil Procedure to Actions Brought by the Equal Employment Opportunity Commission,* 29 Case W. Res. L. Rev. 343 (1979).

3. Neither the Civil Rights Act of 1964, as amended, nor the Federal Rules of Civil Procedure exempt the EEOC from compliance with Rule 23. A reading of Rule 1, Rule 81, and interpretative case law of these two Federal Rules of Civil Procedure, clearly indicates that agencies of the United States, unless exempted by Rule 81 or by other subsequently enacted or amended federal statutes, are to comply with the federal rules. See *United States v. Procter & Gamble,* 356 U.S. 677, 681, 78 S. Ct. 983, 21 L. Ed. 2d 1077 (1958). While Congress does have the statutory power to supersede the federal rules, unless Congress clearly expresses an intent to do so, subsequently enacted statutes are to be construed to harmonize with the federal rules. *United States v. Gustin-Bacon Division,* 426 F.2d 539 (10th Cir. 1970), *cert. denied,* 400 U.S. 832 (1970). A departure from the federal rules, especially the complete abrogation of an important rule as to an entire class of lawsuits, is not lightly to be inferred from an Act of Congress which does not explicitly amend the federal rules nor even mention Rule 23. If the Ninth Circuit decision is not reversed, one suggestion will be that the EEOC can selectively choose those federal rules with which it will comply since Title VII does not state it is

bound by any of them, which petitioners' maintain is incorrect.

It is undisputed that §706 does not clearly exempt the EEOC from compliance with either the federal rules in general or Rule 23 in particular. On the contrary, the legislative history demonstrates that Congress was aware of the class action nature of §706 actions when it conferred standing on the EEOC to bring such actions and Congress contemplated that Rule 23 would apply whether the suit was brought by private individuals or by the EEOC on their behalf, as occurred herein.[3]

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3. Senator Javits, one of the floor managers of the 1972 legislation and the ranking minority member of the committee which reported it, pointed out to the Senate that it was by virtue of Rule 23 that EEOC would have authority to secure class relief when suing under §706. He explained that if the EEOC "can sue for an individual claimant, then they can sue for a group of claimants", since "this is provided for by the rules of civil procedures in the Federal courts." SENATE COMM. ON LABOR & PUBLIC WELFARE, 92d CONG., 2d SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1589 (1972). Senator Javits went on to state: "I have referred to the rules of civil procedure. I now refer specifically to Rule 23 of those rules, which is entitled 'Class Actions' and which give the opportunity to engage in the Federal court in class actions by properly suing parties. We ourselves have given permission to the EEOC to be a properly suing party." *Id.* at 1590.

It is important to distinguish the concept of standing to sue from the requirement of complying with the certification requirements of Rule 23. Congress has clearly given the EEOC standing to sue under §706 on a broad basis for all matters discovered during the investigation, even if the individuals who brought the initial charge could not sue because they lacked standing to bring suit for discrimination not involving them. This does not, however, decide the applicability of Rule 23 to EEOC class actions where the rationale differs considerably. The characterization of the EEOC as standing in the shoes of the individual claimants when it brings suit under §706 was discussed in depth by Chief Justice Berger and Justice Rehnquist in their dissent in *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 380, 97 S. Ct. 2447, 2462, 53 L. Ed. 402, 421 (1977). The majority opinion did not address the dissent's characterization of the role of the EEOC in §706 suits, but neither did it dispute the dissent's analysis. If this latter analysis is correct, as petitioner contends, it further supports the conclusion of the applicability of Rule 23 to §706 actions by the EEOC, which have been precipitated by individual charging parties.



4. Although the Court of Appeals for the Ninth Circuit saw no reason to draw a distinction between §707 pattern and practice suits and §706 actions with respect to the applicability of Rule 23, whether the EEOC must comply with Rule 23 in proceedings initiated under §707 of Title VII does not decide whether it must comply with Rule 23 in proceedings initiated under §706.[4]

The court of appeals failed to recognize that the differences between these two sections are controlling, not their similarities. Only the EEOC may institute §707 cases against nongovernmental employers, a power it inherited from the Attorney General in 1972, and this power is in no way dependent upon the existence of a particular private charge filed with the Commission. No private right of action exists under that section; the private party seeking redress against discrimination may sue only under §706.[5] Similarly, a violation of §706 does not necessarily establish that §707 has also been violated. Due to the fact a subsequent private §707 suit is not possible, less purpose is served by application of Rule 23 to the EEOC in a §707 case. It does not follow, however, that where the EEOC proceeds under §706, a defendant should be required to defend the same charge of discrimination involving the same class of employees in a multiplicity of actions solely because the EEOC, rather than a private class representative, is the named plaintiff. The application of Rule 23 provides the solution by consolidating the

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4. The Attorney General has not yet been required by any court to comply with Rule 23 in a pattern and practice suit under §707, although the question remains as to whether *this* Court would reach the same decision on the applicability of Rule 23 to §707. *See,* Bumpass, *supra* note 2, at 390-394.

5. *See, e.g., United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 843 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

multiplicity of claims into a single action and achieving finality as to those claims.

5. EEOC compliance with Rule 23 will promote Congress' aim in achieving finality of litigation and avoiding unnecessary duplication of proceedings. The claims of class member employees would be adequately resolved in one proceeding, without subjecting employers to the potential of future time consuming, expensive litigation and numerous individual actions. See *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 715 (7th Cir. 1969). This result is fully consistent with the scheme of Title VII as amended in 1972. Any other result would be contrary both to Rule 23 and to the public policies embodied in that rule. Additionally, the certainty of a final and binding judicial decision emanating from a §706 class suit entered into by the EEOC enhances the possibility of pre-trial settlement of litigation. Absent the application of Rule 23, settlement of an EEOC action is not binding upon individual employees who are then free to bring their own subsequent actions against the defendant employer. *See, EEOC v. Datapoint Corp.*, 412 F. Supp. 406 (W.D. Tex. 1975), *aff'd in part*, 570 F.2d 1264 (5th Cir. 1978). Such risks and the resulting chilling effect upon settlement efforts can be avoided when the provisions of Rule 23 are applied and the settlement agreement that is entered into is binding upon all members of the class.

To the extent needed, Rule 23 itself permits flexibility. District courts, in an appropriate case, may choose the option of Rule 23(b)(3) and permit class members to opt out if, after receiving notice of litigation, they are dissatisfied with the EEOC as class representative or for any reason prefer not to be bound. This procedure was followed in *EEOC v. Data Point Corp.*, 570 F.2d 1264 (5th Cir. 1978). There is no need, and in fact this approach should be discouraged, for resolving through equitable relief, case-by-case, the problems which arise in such broad class actions if Rule 23 is not applied.



## CONCLUSION

In the absence of a clear legislative mandate, a court should not depart from the uniform application of procedural rules governing suits under §706 merely because the EEOC, rather than a private litigant, pursues claims for relief. In any event, the confusion created by the split in the circuit courts of appeal and the district courts should be resolved and the petition for a writ of certiorari should be granted.

DATED this 19th day of September, 1979.

Respectfully submitted,

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# APPENDIX A

## 599 FEDERAL REPORTER, 2d SERIES, 322

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Plaintiff-Appellee,*

v.

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC.,
and West Coast Telephone Company of California, Inc.,
*Defendants-Appellants,*

Local Union No. 89,
International Brotherhood of Electrical Workers,
*Defendant.*

No. 78-1849

United States Court of Appeals, Ninth Circuit.
June 27, 1979.

Equal Employment Opportunity Commission brought suit against company, subsidiary company and union alleging discrimination against women employees with respect to maternity leave, access to craft jobs and opportunities for promotion to managerial positions. The United States District Court for the Western District of Washington, Walter T. McGovern, Chief Judge, adopted recommendation of magistrate and entered order denying company's motion to dismiss class action aspects of case, and company appealed. The Court of Appeals, Jameson, District Judge, sitting by designation, held that: (1) compliance with rule of civil procedure governing class actions was not expressly mandated either by rule itself or 1972 amendments to Title VII of Civil Rights Act authorizing Commission to bring suit to prevent unlawful employment practices, and (2) trial court could fashion appropriate orders to insure that defendants were not subjected to double payment or unnecessarily duplicative litigation in that court, under its broad equitable powers, could prescribe procedures and remedies which were fair and equitable to all parties.

Affirmed.

**1. Civil Rights § 9.10**

Title VII of the Civil Rights Act of 1964 was enacted to assure equality of employment opportunities by eliminating practices and devices which discriminate on basis of race, color, religion, sex, or national origin. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

**2. Civil Rights § 31, 37**

Equal Employment Opportunity Commission does not have authority to adjudicate claims or impose sanctions: final responsibility for enforcement of Title VII is vested with federal courts. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

**3. Civil Rights § 41, 46**

If Equal Employment Opportunity Commission is unable to secure acceptable conciliation agreement, Commission is authorized to bring civil action against any respondent which is not a governmental entity, and in such action court may grant injunctive relief and order appropriate affirmative action. Civil Rights Act of 1964, § 706(e)(1) as amended 42 U.S.C.A. § 2000e-5(f)(1).

**4. Civil Rights § 47**

Justice Department has authority to bring suit against governmental entity which engages in unlawful discrimination. Civil Rights Act of 1964, § 707 as amended 42 U.S.C.A. § 2000e-6.

**5. Civil Rights § 47**

1972 amendments to Title VII of Civil Rights Act of 1964 were intended to increase enforcement power of Equal Employment Opportunity Commission by authorizing Commission to bring civil suit. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

**6. Federal Civil Procedure § 161**

For proper maintenance of class action, court must find not only that all of prerequisites to class action are met but also that suit satisfies standards for at least one of three types of class suits enumerated in subdivision of rule governing when class actions are maintainable. Fed.Rules Civ. Proc. rules 23(a, b), 28 U.S.C.A.



**7. Federal Civil Procedure § 161**

In determining whether action may properly be brought under rule governing class actions, court must first find that class exists and that named representative is a member of a class which he purports to represent. Fed.Rules Civ. Proc. rule 23, 28 U.S.C.A.

**8. Federal Civil Procedure § 184**

Every action under Title VII of Civil Rights Act is in effect a class action. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.; Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

**9. Federal Civil Procedure § 161**

Litigant must be member of class which he seeks to represent at time class action is certified by district court. Fed. Rules Civ.Proc. rule 23, 28 U.S.C.A.

**10. Federal Civil Procedure § 164**

If party has himself suffered injury, statute may permit him to sue on behalf of third parties or to assert a public interest.

**11. Federal Civil Procedure § 164**

Class actions by a governmental entity are appropriate under certain circumstances if the entity is able to satisfy the prerequisites of rule governing class action; however, merely being governmental representative does not entitle one to relief as member of the class. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

**12. Civil Rights § 47**

Title VII explicitly grants Equal Employment Opportunity Commission authority to assert rights of others which may have been impaired by activities in question; thus, Commission has standing to sue. Civil Rights Act of 1964, § 706(e)(1) as amended 42 U.S.C.A. § 2000e-5(f)(1).

**13. Statutes § 184**

Starting point in every case involving construction of statute is the language itself.

**14. Federal Civil Procedure § 184**

Legislative history of statute authorizing Equal Employment Opportunity Commission to bring civil suit failed to express clear intention as to whether Commission was required to comply with or was exempt from class action certification requirement. Fed.Rules Civ.Proc. rules 23, 81, 28 U.S.C.A.; Civil Rights Act of 1964, § 706 as amended 42 U.S.C.A. § 2000e-5.

**15. Civil Rights § 47**

If government alleges systemwide pattern or practice of resistance to full enjoyment of Title VII rights, government must prove more than mere occurrence of isolated or accidental or sporadic discriminatory acts; government must establish by preponderence of evidence that discrimination was the company's standard operating procedure, the regular rather than the unusual practice. Civil Rights Act of 1964, § 707 as amended 42 U.S.C.A. § 2000e-6.

**16. Civil Rights § 47**

Where government alleges pattern or practice of resistance to full enjoyment of Title VII rights, government is not required at the initial liability stage to offer evidence that each person for whom it will ultimately seek relief was the victim of the employer's discriminatory policy; rather, its burden is to show that such a policy existed. Civil Rights Act of 1964, § 707 as amended 42 U.S.C.A. § 2000e-6.

**17. Federal Civil Procedure § 184**

Although there may be differences in the nature and burden of proof in Equal Employment Opportunity Commission actions under section of Title VII governing power of Commission to prevent unlawful employment practices and pattern and practice suits under section governing civil actions by Attorney General, action under either section seeks to vindicate public policy and individual relief may be granted under either section for victims of discriminatory practices; thus, no distinction should be drawn between actions under either section with respect to applicability of rule governing class action. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.; Civil Rights Act of 1964, §§ 706, 707 as amended 42 U.S.C.A. §§ 2000e-5, 2000e-6.



**18. Federal Civil Procedure § 184**

Compliance with rule governing class actions not expressly mandated for action by Equal Employment Opportunity Commission seeking relief from discriminatory practices affecting class of individuals either by rule governing class actions or amendments to Title VII authorizing Commission to bring civil action. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.; Civil Rights Act of 1964 § 706 as amended 42 U.S.C.A. § 2000e-5.

**19. Federal Civil Procedure § 184**

Procedures of rule governing class actions applicable to private litigant in class action to prevent unlawful employment practices are available to courts in action by Equal Employment Opportunity Commission under broad equitable powers vested in the courts. Fed.Rules Civ.Proc. rules 23, 23(a), 28 U.S.C.A.; Civil Rights Act of 1964, §§ 706, 706(g) as amended 42 U.S.C.A. §§ 2000e-5, 2000e-5(g).

**20. Federal Civil Procedure § 184**

Even if action by Equal Employment Opportunity Commission to prevent unlawful employment practices contains request for back pay, case continues to be properly certifiable under provision of rule allowing class action to be maintained if party opposing class has acted or refused to act on grounds generally applicable to the class. Fed.Rules Civ.Proc. rule 23(b)(2), 28 U.S.C.A.; Civil Rights Act of 1964, § 706 as amended 42 U.S.C.A. § 2000e-5.

**21. Constitutional Law § 309(1.5)**
**Federal Civil Procedure § 161**

Where action is certified under provision of rule allowing class action to be maintainable if party opposing class has acted or refused to act on grounds generally applicable to the class, absent class members are not required to receive notice or to have opportunity to opt out of the suit; due process requires only that class members be adequately represented. Fed.Rules Civ.Proc. rule 23(b)(2), 28 U.S.C.A.; U.S.C.A. Const. Amend. 5.

**22. Federal Civil Procedure § 161**

In class action certified under provision of rule providing class action is maintainable if party opposing class has acted or refused to act on grounds generally applicable to the class, court in its discretion may direct that notice be given to members of class. Fed.Rules Civ.Proc. rule 23 (b)(2), (d), 28 U.S.C.A.

**23. Federal Civil Procedure § 161**

Trial court need not require notice or allow absent members of class to opt out if Equal Employment Opportunity Commission sues in class action to prevent unlawful employment practices; however, equitable powers of court may be exercised to require notice to class members. Fed. Rules Civ.Proc. rules 23, 23(d), 28 U.S.C.A.; Civil Rights Act of 1964, §§ 706, 706(g) as amended 42 U.S.C.A. §§ 2000e-5, 2000e-5(g).

**24. Civil Rights § 46**

Broad equitable powers are vested in federal courts under provision of Title VII governing power of Equal Employment Opportunity Commission to prevent unlawful employment practices, and courts are empowered to fashion such relief as particular circumstances of case may require. Civil Rights Act of 1964, § 706(g) as amended 42 U.S.C.A. § 2000e-5(g).

**25. Equity § 39(1)**

It is historic purpose of equity to secure complete justice, and courts will be alert to adjust the remedies so as to grant the necessary relief.

**26. Civil Rights § 47**

In class action by Equal Employment Opportunity Commission to prevent unlawful employment practices, court may fashion appropriate orders to insure that defendants are not subjected to double payment or unnecessarily duplicative litigation. Civil Rights Act of 1964, § 706(g) as amended 42 U.S.C.A. § 2000e-5(g).

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Vincent J. Blackwood, Atty. (argued), Abner W. Sibal, Charles L. Reischel, Joseph T. Eddins, Jr., E.E.O.C., Washington, D.C., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Washington.

Before GOODWIN and ANDERSON, Circuit Judges, and JAMESON,* District Judge.

JAMESON, District Judge:

This interlocutory appeal presents the question of whether the Equal Employment Opportunity Commission (EEOC) has authority under § 706(f)(1) of Title VII, Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-5(f)(1) (Supp. V. 1975), to seek relief from discriminatory practices affecting a class of individuals without complying with the class certification requirements of Rule 23, F.R. Civ.P.

Plaintiff-appellee, EEOC, brought suit against the defendants-appellants, General Telephone Company of the Northwest, Inc., its subsidiary, West Coast Telephone Company of California, Inc., and Local Union No. 89, International Brotherhood of Electrical Workers (collectively called General Telephone), alleging that General Telephone discriminated against women employees with respect to maternity leave, access to craft jobs, and opportunities for promotion to managerial positions. EEOC sought injunctive relief and back pay for individuals affected by the challenged practices.[1]

EEOC moved "the Court for an order bifurcating the issue of class liability from the issue of individual damages pursuant to Rule 42(b), F.R.Civ.P.". On the same day the

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*The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

1. It appears from answers to interrogatories that four employees of General Telephone had filed sex discrimination charges with EEOC. After investigation the Commission found reasonable cause to believe that General Telephone and the other defendants were discriminating against female employees. The EEOC identified as presumptively aggrieved by General Telephone's failure to consider women equally "all female employees, female applicants for employment and women who would have applied but for the alleged unlawful discrimination".

district court referred the action to a magistrate for trial. General Telephone filed a motion to "dismiss the class action aspects of plaintiff's complaint."

The magistrate issued a "Report and Recommendation" to the district court, recommending that General Telephone's motion to dismiss be denied. He concluded that the EEOC is not required to comply with Rule 23 for three reasons: (1) the EEOC is not required to comply with Rule 23 in § 707 (42 U.S.C. § 2000e-6) "pattern and practice" suits, and suits under § 706 (42 U.S.C. § 2000e-5) should not be treated differently; (2) the statute itself provides the necessary authority for the EEOC to bring suit on behalf of a class; and (3) it is undesirable and impractical to require the EEOC to comply with Rule 23.

The district court adopted the magistrate's recommendation and entered an order denying General Telephone's motion to dismiss the class action aspects of the case. The order was later amended to certify the question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and this court entered an order granting permission to appeal. On appeal General Telephone contends that Rule 23 applies to class actions brought by the EEOC under § 706 of Title VII, since neither the Civil Rights Act of 1964 nor the Federal Rules exempt the EEOC from compliance with Rule 23.

*The Civil Rights Act as Amended*

[1] Congress enacted Title VII of the Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C. § 2000e *et seq.*, to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). "Cooperation and voluntary compliance were selected as the preferred means for achieving the goal." To that end the EEOC was created and a procedure established whereby "state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1973).



[2-4] Title VII of the Civil Rights Act was amended in 1972. The amendments expanded the enforcement authority of the EEOC.[2] Under the 1972 amendment the Commision is empowered to "prevent any person from engaging in any unlawful employment practice." § 706(a), 42 U.S.C. § 2000e-5(a). If the Commission is unable to secure an acceptable conciliation agreement, the Commission is authorized to bring a civil action against any respondent which is not a governmental entity. § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).[3] In such an action the court may grant injunctive relief and order appropriate affirmative action. Under the amendment the Commission also has "authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission." § 707(e), 42 U.S.C. § 2000e-6(e).[4]

[5] It is clear from the legislative history that the 1972 amendments were intended to increase the enforcement power of the EEOC by authorizing the Commission to bring civil suits. The Senate Labor Committee Report noted that the burden of suits by disadvantaged individuals had effectively precluded recovery in valid claims, and the amendment was an effort to end what had been described as a "modern day David and Goliath confrontation". The purpose of Title VII was to be accomplished "through a system of administrative hearings, Commision decisions and orders, and ultimate court review in appropriate cases —the method which has long been utilized by other regulatory agencies". Senate Labor Committee Report, reprinted in "The Equal Employment Opportunity Act of 1972", Bureau of National Affairs, Inc. (hereinafter BNA) at 241.

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2. The Commission does not, however, have authority to adjudicate claims or impose sanctions. Final responsibility for enforcement of Title VII is vested with federal courts. *Alexander v. Gardner-Denver Co.*, 415 U.S. at 44, 94 S.Ct. 1011.

3. The Justice Department is given the authority to bring suit against a governmental entity which engages in unlawful discrimination. 42 U.S.C. § 2000e-6.

4. Under the original act Title VII gave individuals the right to bring suits. § 707 gave the Attorney General the authority to bring "pattern and practice" suits. The authority of the EEOC was limited to investigation and conciliation.

A private right of action was retained, but it was "hoped that recourse to the private law suit [would] be the exception and not the rule, and that the vast majority of complaints [would] be handled through the offices of the EEOC or Attorney General as appropriate". Section-by-Section Analysis, Congressional Record, March 6, 1972, BNA at 130 (analysis of § 706(f)(1)).

*Class Actions Under Rule 23*

Rule 1 of the Federal Rules of Civil Procedure states that the federal rules "govern the procedure in the United States district courts in all suits of a civil nature . . . with the exceptions stated in Rule 81".[5] The rules "shall be construed to secure the just, speedy, and inexpensive determination of every action".

[6] Rule 23(a) provides that, "One or more members of a class may sue or be sued as representative parties on behalf of all," only if the prerequisites therein specified are met.[6] For the proper maintenance of a class action the court must find not only that all of the prerequisites of subdivision (a) are met, but also that the suit satisfies the standards for at least one of the three types of class suits enumerated in subdivision (b). 3B Moore's Federal Practice, § 23.03, at 23-109.

[7] In determining whether an action may properly be brought under Rule 23, a court must first find (1) that a class exists, and (2) that the named representative is a member of the class he purports to represent. See Wright and Miller, Federal Practice and Procedure: Civil Class Actions, §§ 1760 and 1761; 3B Moore's Federal Practice, §§ 23.04[1] and [2].

[8] The first prerequisite, existence of a class, presents no problem. Every action under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, is in effect a class action.

5. Rule 81 does not contain an exemption for suits brought by the EEOC under Title VII.

6. The prerequisites are that: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class". Rule 23(a).



*Gay v. Waiters' and Dairy Lunchmen's Union,* 549 F.2d 1330, 1333 (9 Cir. 1977) and cases cited therein.

[9] The second prerequisite, membership in the class, "is inherent in the real party in interest requirement prescribed by Rule 17(a) and is reinforced by the statement in Rule 23(a) that 'one or more members of a class may sue or be sued as representative parties . . .' ". Wright and Miller, *supra,* § 1761. The "member of the class" requirement has been strictly applied when a private party seeks to be named as a class representative. See *Warth v. Selden,* 422 U.S. 490, 502, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Sosna v. Iowa,* 419 U.S. 393, 403, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975); *DuPree v. United States,* 559 F.2d 1151, 1153 (9 Cir. 1977).[7]

[10, 11] On the other hand, if a party has himself suffered an injury, a statute may permit him to sue on behalf of third parties or assert a "public interest". *Sierra Club v. Morton,* 405 U.S. 727, 737-38, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) and cases there cited. Class actions by a governmental entity are appropriate under certain circumstances, if it is able to satisfy the prerequisite of Rule 23. *Hawaii v. Standard Oil Co. of California,* 405 U.S. 251, 266, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). But merely being a governmental representative will not entitle one to qualify as a member of the class. *DuPree v. United States,* 559 F.2d at 1154.

[12] Title VII gives the EEOC the standing to sue. The statute explicitly grants the EEOC the authority to assert the rights of others which may have been impaired by the activities in question. See *DuPree v. United States,* 559 F.2d at 1154. The legislative history makes it clear that the EEOC is a "properly suing party".

Based solely upon the language of Rule 23, it can be argued that the Rule does not apply to actions brought by the EEOC to enforce Title VII rights. The EEOC obviously is not a member of the "class" it represents. It does not satisfy the requirement of Rule 23(a)(3) that the "claims

7. As the Court said in *Sosna v. Iowa,* "A litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court." 419 U.S. at 403, 95 S.Ct. at 559.

or defenses of the representative parties" be "typical of the claims or defenses of the class". While individuals affected by an EEOC action may receive specific kinds of relief, the objective of the EEOC is to vindicate the public interest. Moreover, while class action certification requires a judicial determination that the named plaintiffs will adequately represent the class, Congress has already made the determination that the EEOC is an adequate representative of victims of employment discrimination.[8]

*Use of the Class Action under Title VII*
*Statutory Construction*

[13] Logic and precedent dictate that "the starting point in every case involving the construction of a statute is the language itself". *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330, 98 S.Ct. 2370, 2375, 57 L.Ed.2d 239 (1978) quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975). The statute, 42 U.S.C. § 2000e-5(f)(1), states only that "the Commission may bring a civil action". There is no indication in the statute itself that the Commission must qualify as a class representative when it sues on behalf of a class. Nor is there any provision in either 42 U.S.C. § 2000e-5 or the Federal Rules of Civil Procedure, Rule 81, explicitly exempting the Commission from the Rule 23 requirement.

[14] The legislative history likewise fails to express clearly an intention that the EEOC comply with or be exempted from the class action certification requirement.[9]

8. See Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of EEOC v. D.H. Holmes Co.*, 28 Syracuse Law Review 741, 746 (1977).

9. In *EEOC v. D. H. Holmes Co., Ltd.*, 556 F.2d 787, 794 (5 Cir. 1977), *cert. denied* 436 U.S. 962, 98 S.Ct. 3082, 57 L.Ed.2d 1129, the court found "[n]othing in the statutory language or legislative history of Title VII . . . (to) supports the position EEOC advances regarding an action *outside* Rule 23". Professor Reiter found the legislative history to be "more ambiguous than the court was willing to recognize" in *Holmes*. Recognizing that language in the legislative history "may support the position adopted by the Fifth Circuit in *Holmes*, it is probably more accurate to state that such language is inconclusive on the matter and that in reality Congress did not consider whether the Commission was bound to comply with Rule 23". Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of EEOC v. D. H. Holmes Co., supra* at 753-754.



Most of the comments with reference to the use of class actions concerned their use by private litigants who before the 1972 amendments were the only parties who could sue on a charge of employment discrimination. Congress expressed its approval of the liberal manner in which the class action requirements had been applied and stated that the 1972 amendment was not intended to "affect the *present use* of class actions lawsuits under Title VII in conjunction with Rule 23".[10]

The Section-by-Section Analysis of § 706 printed in the Congressional Record establishes that (1) under the 1972 amendments legal action by the EEOC is preferred to that by private litigants,[11] and (2) when a private litigant brings a class action suit, the liberal application of the Rule 23 requirement by the courts is the appropriate treatment. See n. 10 *supra*. There is no discussion of class action procedure when the EEOC sues on behalf of a class.[12]

In Congressional debate on other provisions in the 1972 amendments, collateral reference is made to the authority

10. "In establishing the enforcement provisions under this subsection and subsection 706(f) generally (allowing the EEOC the right to sue as well as retaining the private litigant's right to sue), it is not intended that any provisions contained therein shall affect the *present use* of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. The courts have been particularly cognizant of the fact that the claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that many Title VII claims are necessarily class action complaints and that, accordingly, it is not necessary that each individual entitled to relief be named in the original charge or in the claim for relief." Section-by-Section Analysis, BNA at 131. (emphasis added)

11. "It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General, as appropriate. However, as the individual rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief." Section-by-Section Analysis, BNA at 131.

12. The "present use" of class action (see n. 10) suits involved use by private litigants on behalf of a class. A provision limiting class actions was contained in the House bill and specifically rejected by the Conference Committee. Conference Committee Report, BNA at 122, U.S. Code Cong. & Admin.News, pp. 2137, 2179, 2183 (1972).

granted to the EEOC to sue and the use of class actions. These statements must be considered in their proper context in determining Congressional intent as to the use of the class action. Most of the remarks were made in debate over the authority of the EEOC under § 707 of the Act, the section which authorized the EEOC to bring suit to curtail a pattern or practice of employment discrimination, a power that had previously been vested in the Department of Justice alone. Senator Hruska offered an amendment which would have retained the authority to bring pattern and practice suits in the Department of Justice.[13] Senators Williams and Javits, floor managers of the Senate bill, spoke against the proposed amendment. The substance of their argument was that the authority granted to the EEOC under § 706 to allow it to seek court enforcement, rather than limiting its power to issuance of cease and desist orders as had been suggested at one point, was very broad and included the power to bring a pattern and practice type suit.[14] They argued against placing such broad power in both the Department of Justice and the EEOC.

The only remarks in the Congressional debate which might tend to show that Congress intended the EEOC to comply with the provisions of Rule 23 are those of Senator Javits in arguing against the amendment which would have

13. Senator Hruska said in part:

> Section 706 . . . is a complaint-oriented procedure and is not geared to the management of pattern and practice suits which are in the nature of class action suits.
>
> It seems to me that the manager of this bill would be well advised to eliminate that Section (power to EEOC under § 707 to enforce pattern and practice suits), because it is wrong to put into the Commission's authority the prosecution of what amounts to class actions.
>
> 118 Cong.Rec. 4080 (1972), BNA at 360.

14. In responding to Senator Hruska, Senator Williams said in part:

> There will be no difference between the cases that the Attorney General can bring under section 707 as a "pattern and practice" charge and those which the Commission will be able to bring as a result of yesterday's decision to give EEOC court enforcement powers. Frankly, the pattern and practice section becomes a redundancy in law.
>
> 118 Cong.Rec. 4081 (1972), BNA at 361.



limited the EEOC's power.[15] He indicated that the EEOC has broad authority to sue on behalf of a group of claimants under § 706 just as the Department of Justice had done in "pattern and practice suits". With specific reference to Rule 23 he noted that this Rule, "entitled Class Actions", gives "the opportunity to engage in the Federal Court in class actions by properly suing parties". He continued: "We ourselves have given permission to the EEOC to be a properly suing party."

While Senator Javits' remarks might be interpreted to signify the necessity of complying with Rule 23, they may also be interpreted to show the breadth of suit which the EEOC would be entitled to bring, rather than indicating that the EEOC would be subject to the procedural requirements of the Rule in bringing a class action.[16] In fact, his

15. Senator Javits in opposing Senator Hruska's proposed amendment said in part:

> By our decision yesterday (granting the EEOC authority to bring court suits) we gave the EEOC the power to bring suit in big as well as small cases . . .
>
> These are essentially class actions and if (the Commission) can sue for an individual claimant, then they can sue for a group of claimants.
>
> It seems to me that this is provided for in the Rules of Civil Procedure in the Federal Courts, and also is inherent in the amendment which we adopted. Under these circumstances it seems to me that this amendment is conclusively dealt with, and whatever may have been the argument which might have obtained in respect to cease and desist orders and the desire to retain this jurisdiction in the Department of Justice when the Commission was going to proceed by cease and desist orders, rather than by suit, has now given way to the fact that the Commission can only proceed by suit. And if it proceeds by suit then it can proceed by class suit. If it proceeds by class suit it is in the position of doing exactly what the Department of Justice does in pattern and practice suits.
>
> I have referred to the rules of civil procedure. I now refer to Rule 23 of those rules, which is entitled Class Actions and which give the opportunity to engage in the Federal Court in class actions by properly suing parties. We ourselves have given permission to the EEOC to be a properly suing party . . .
>
> 118 Cong. Rec. 4082 (1972), BNA at 361-362.

16. Professor Reiter commented: "However, the remarks of Senator Javits are not as conclusive as they might first appear to be. His comments were not made for the purpose of showing that the Commission is bound to follow rule 23 whenever it sues on behalf of a group of persons, but instead were made to show the breadth of a suit which may be brought under either Section 706 or Section 707." Reiter, *The Applicability of Rule 23 in EEOC Suits: An Examination of EEOC v. D. H. Holmes Co., supra* at 753 n. 72.

concluding remarks quite clearly suggest that Senator Javits was simply stating that Congress itself had made the determination of the propriety of a class action which a court must make under Rule 23. We are not persuaded that Senator Javits' remarks manifest a Congressional intent that an action by the EEOC requires a compliance with Rule 23.

*Public Policy of EEOC Actions*

This court has held that the EEOC is a public agency "charged with the vindication of public policy, not merely with the enforcement of private rights". *EEOC v. Occidental Life Insurance Co., of California*, 535 F.2d 533, 542 (9 Cir. 1976) *aff'd* 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977). In *Occidental* the court was concerned, *inter alia*, with the application of a state statute of limitations in an EEOC suit under § 706. We recognized the well established rule that "in a *private* civil rights action," where Congress has not provided a statute of limitations, the state statute applicable to similar litigation will be applied; but we concluded that the EEOC in seeking injunctive relief, as well as back pay, "promotes *public* policy and seeks to vindicate rights belonging to the United States as sovereign". *Id.* at 537.[17] We held further that the fact that private parties may benefit from the public "action does not detract from the public nature of [the] proceedings", *Id.* at 539, and that "[the] enforcement by the EEOC of the objectives of Title VII should not be frustrated because a private charging party may not have had

17. Appellants rely heavily on the dissenting opinion in the Supreme Court, which concluded that EEOC suits under § 706 were actions primarily designed to redress injuries suffered by individual claimants and rejected the holding of this court that because the EEOC promotes public policy by its prayer for injunctive relief, it therefore "seeks to vindicate rights belonging to the United States as sovereign". It is true, as appellants contend, that the majority opinion did not expressly address the dissent's characterization of the role of the EEOC in § 706 suits, but it did hold that "it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies". 432 U.S. at 367, 97 S.Ct. at 2455. The Court in the majority opinion clearly recognizes a distinction between actions instituted by the EEOC and private class actions by complaints.



'standing' to make a particular claim". *Id.* at 542.[18] Other courts have also recognized that the standing of the EEOC to sue in a § 706 action is not controlled or determined by the standing of the charging party to sue. See, *e.g.*, *EEOC v. General Electric Co.*, 532 F.2d 359, 373 (4 Cir. 1976).

In concluding that the EEOC was required to comply with Rule 23 in a § 706 action, the court in *EEOC v. D. H. Holmes Co., Ltd.*, 556 F.2d at 794,[19] said in part:

> [Section 706] gives EEOC standing to sue under Title VII to the same extent as individuals aggrieved by discrimination in employment. Logically it follows, then, that when EEOC brings a class action suit under § 706, 42 U.S.C. 2000e-5(f)(1) (as an individual aggrieved may do), it does so subject to Rule 23 just as the private litigant in whose place it stands.

In other words, the court in *Holmes* did not recognize the distinction between a private class action by aggrieved individuals and an action by the EEOC "seeking vindica-

18. See also *EEOC v. Hearst Corp., Seattle Post-Intelligencer*, 553 F.2d 579 (9 Cir. 1976), where this court again recognized that "EEOC is a public agency seeking vindication of public rights" and that a "narrower rule" would be applicable in private actions seeking judicial relief for incidents not listed in an original EEOC charge.

19. Both parties recognize that *Holmes* is the only case decided by a circuit court which has addressed the precise issue presented in this case. The Fifth Circuit reaffirmed its holding in *Holmes* in *EEOC v. Datapoint Corp.*, 570 F.2d 1264, 1268 (1978). District courts have held both ways, for a variety of reasons. Cases holding that the EEOC must comply with Rule 23, under § 706 or § 707, include *EEOC v. Delaware Trust Company*, 81 F.R.D. 448 (D.Del.1979); *EEOC v. Akron National Bank and Trust Co.*, 78 F.R.D. 684 (N.D.Ohio 1978); *EEOC v. Page Engineering Co.*, 17 E.P.D. ¶ 8603 (N.D.Ill.1978). Cases holding to the contrary include *EEOC v. Roxene Polymers Co.*, 10 F.E.P. 61 (W.D.Tex.1975); *EEOC v. Lutheran Hospital*, 10 F.E.P. 1177 (E.D.Mo. 1974); *EEOC v. CTS of Asheville, Inc.*, 13 F.E.P. 852 (W.D.N.C.1976); *EEOC v. Pinkerton, Inc.*, 14 F.E.P. 1431 (W.D.Pa.1977); *EEOC v. Raymond Metal Products Co.*, 17 F.E.P. 206 (D.Md.1978); *EEOC v. Schlueter Mfg. Co.*, 17 F.E.P. 53 (E.D.Mo.1978); *EEOC v. Whirlpool Corp.*, 80 F.R.D. 10 (N.D.Ind.1978); *EEOC v. Singer Controls of America*, 80 F.R.D. 76 (N.D.Ohio 1978); and *EEOC v. Vinnell-Dravo-Lockheed-Mannix*, 417 F.Supp. 575, 577 (E.D.Wash.1976), where the court concluded that "while the courts have steadfastly required private litigants to comply with Rule 23, compliance with that rule has not been required where an agency of the government sought class relief from discriminatory employment practices".

tion of public rights", which this court under different circumstances clearly recognized in *Occidental*. 535 F.2d at 542 n. 17.

*Actions under § 706 and § 707*

Under the present statute, the EEOC may bring civil actions against private employers under § 706, 42 U.S.C. § 2000e-5, or a pattern or practice suit under § 707, 42 U.S.C. § 2000e-6.[20] The Attorney General may bring an action under either section against a public employer.[21] Civil actions based on individual complaints may still be brought by the aggrieved party under § 706.

The report of the magistrate adopted by the district court noted that the Attorney General had not been required to comply with Rule 23 in a pattern and practice suit under § 707 and that there is nothing in the statute or legislative history to suggest a different requirement for the EEOC in a § 706 suit. Likewise the court concluded that it would be illogical to apply a different rule with respect to § 706 actions "in view of the seemingly identical nature of the two sections". Appellants argue (1) that compliance with Rule 23 was not addressed in any of the § 707 suits by the Attorney General, and (2) that a distinction continues to exist between § 706 and § 707 actions, since "§ 706 is concerned with rectifying individual cases of discrimination".[22] As Senator Williams stated, however, in the Senate debate, (n. 14, supra) there "will be no difference between the cases that the Attorney General can bring under section 707 . . . and those which the Commission will be able to bring" under its enforcement powers pursuant to § 706. An action by the EEOC under each section seeks to vindicate public rights.

20. Section 707, 42 U.S.C. § 2000e-6, reads in part:

> (c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission.

21. For further discussion of the effect of the 1972 Amendments and the President's Reorganization Plan No. 1 of 1978 issued pursuant thereto, see *United States v. Fresno Unified School District*, 592 F.2d 1088 (9 Cir. 1979).

22. In *Holmes* the court suggested that if, for any reason, EEOC is not certified under Rule 23 but still believes a pattern or practice of discrimination exists "its recourse is to file a suit under § 707". 556 F.2d at 792 n. 8.



The Supreme Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)[23] discusses similarities and distinctions between § 706 and § 707 actions. The key distinctions are in the burden and nature of proof required. The Court there compared an individual's § 706 action with the Government's § 707 pattern and practice action. Referring to *Franks v. Bowman*, 424 U.S. 747, 772, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), a § 706 action brought by individuals, the Court noted that the plaintiffs in *Franks* by *"demonstrating the existence"* of a discriminatory pattern and practice "had made out a prima facie case of discrimination against the individual class members", and that the burden then shifted to the employer to prove that individuals were not in fact victims of previous discrimination. 431 U.S. at 359, 97 S.Ct. at 1866.

[15, 16] When the Government, as in *Teamsters v. United States*, alleges a "systemwide pattern or practice of resistence to the full enjoyment of Title VII rights", the Government must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts". It must establish by a *preponderance of the evidence* that the discrimination was the *"company's standard operating procedure*—the regular rather than the unusual practice". 431 U.S. at 336, 97 S.Ct. at 1855.[24] (Emphasis added) With respect to seeking individual relief the Court said in part:

> When the Government seeks individual relief for the victims of discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief . . . As was true of the particular facts in *Franks*, and as typical of Title VII pattern-or-practice suits, the question of individual relief does not arise until it has been proved that the employer

23. At the time the suit was filed the Attorney General was authorized to sue to eliminate discriminatory pattern or practice of unlawful discrimination; the suit was filed pursuant to § 707(a), 42 U.S.C. § 2000e-6(a). In 1974 the EEOC was substituted for the United States. *Teamsters v. United States*, 431 U.S. at 328-329, n. 1, 97 S.Ct. 1843.

24. At the initial, "liability" stage the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employers discriminating policy. Its burden is to show that such a policy existed. 431 U.S. at 360, 97 S.Ct. 1843.

> has followed an employment policy of unlawful discrimination. . . . The Government need only show that an alleged individual discriminatee . . . was a potential victim of the proved discrimination. As in *Franks,* the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons. . . . [T]herefore, every [class member] will be presumptively entitled to relief, subject to a showing by the company that its earlier refusal to place the applicant . . . was not based on its policy of discrimination. *Id.* at 361-362, 97 S.Ct. at 1867-1868.

As noted *supra,* it is clear from the legislative history of the 1972 Amendments that Congress preferred an EEOC action to a private action under § 706, expressing the hope that in the future the private lawsuit would be the exception and not the rule. (See n. 10) The advantage of a § 706 class action brought by the EEOC is that it brings before the court the full range of an employer's employment practices which unlawfully discriminate against a class, not piecemeal adjudication of individual claims, and allows the court to consider a variety of factors in formulating the appropriate remedy. The class action device allows the court to see the full implication of recognizing rights or remedies and allows it to determine what outcome would best serve the policies underlying the cause of action. *Developments—Class Actions,* 89 Harv. L.R. 1318, 1353 (1976).

The Supreme Court in *Teamsters v. United States, supra,* recognizes the necessity of applying basic principles of equity in formulating remedies in Title VII cases, saying in part:

> In devising and implementing remedies under Title VII, no less than in formulating any equitable decree, a court must draw on the "qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." (citations omitted) Especially when immediate implementation of an equitable remedy threatens to impinge upon the expecta-



> tions of innocent parties, the courts must "look to the practical realities and necessities inescapably involved in reconciling competing interests", in order to determine the "special blend of what is necessary, what is fair, and what is workable". (citation omitted) 431 U.S. at 375, 97 S.Ct. at 1874-1975.

The Court lists a number of relevant factors which a trial court should consider in establishing its equitable order, including the number of identifiable victims, consequent extent of necessary relief, number of non-victim employees, the viable alternatives, and the economic circumstances of the industry. *Id.* at 376 and 376 n. 62, 97 S.Ct. 1843.

[17] While there may be differences in the nature and burden of proof in EEOC actions under § 706 and pattern and practice suits under § 707, an action under either section seeks to vindicate public policy. Likewise individual relief may be granted under either action for victims of discriminatory practices. We see no reason why a distinction should be drawn between § 706 and § 707 actions with respect to the applicability of Rule 23.

*Rule 23 Certification*

[18] It is clear that a compliance with Rule 23 is not expressly mandated by either the Rule itself or the 1972 Amendments authorizing the EEOC to bring a civil suit under § 706. Congress has made the determination that the EEOC is a "properly suing party" and an adequate representative of victims of employment discrimination. The Rule 23(a) certification requirement has been satisfied.

[19] In our opinion the other procedures of Rule 23 applicable to a private litigant in a § 706 class action are available to the courts in an EEOC action under the broad equitable powers vested in the courts in § 706(g), 42 U.S.C. § 2000e-5(g),[25] and recognized in *Teamsters v.*

25. As the Court stated in *Franks v. Bowman Transportation Co., supra,* "Congress in § 706(g) vested broad equitable discretion in the federal courts to 'order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate.' The legislative history supporting the 1972 amendments of § 706(g) of Title VII affirms the breadth of this discretion. 'The provisions of [§ 706(g)] are intended to give the courts wide

Footnote 25 continued on page A-22

*United States, supra,* and other cases. (See discussion under Equitable Powers, *infra*).

[20] If the private litigant satisfies the prerequisites of Rule 23(a), the Court then must determine whether the suit is maintainable as a class action under one of the subsections of Rule 23(b). Section 706 suits are generally found to be maintainable under Rule 23(b)(2).[26] See *Developments—Class Actions,* 89 Harv.L.R. at 1349. In fact, a civil rights action where a party is charged with discriminating unlawfully against a class is used as an illustration of a Rule 23(b)(2) class action in the Advisory Committee's Notes to the Proposed Rules of Civil Procedure, 39 F.R.D. 69, 102 (1966).[27] Even if the suit contains a request for back pay the case continues to be properly certifiable under Rule 23(b)(2). *Franks v. Bowman Transportation Co, supra,* 424 U.S. at 751, 755, 96 S.Ct. 1251; *Elliott v. Weinberger,* 564 F.2d 1219, 1228 (9 Cir. 1977) *cert. granted* .... U.S. ...., 99 S.Ct. 75, 58 L.Ed.2d 106 (1978); *Wetzel v. Liberty Mutual Insurance Co.,* 508 F.2d 239, 251 (3 Cir. 1975), *cert. denied,* 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975).

[21, 22] Rule 23(c) directs certain procedural protections in a class action depending upon the Rule 23(b) subsection under which the court certifies the action. When an action is certified under Rule 23(b)(2), as § 706 class actions by private litigants generally are, absent class members are not required to receive notice or to have the opportunity to opt-out of the suit. See *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 n. 14, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); *Souza v. Scalone,* 563 F.2d 385, 386 (9 Cir. 1977); *Elliott v. Weinberger,* 564 F.2d at 1228-29; *Wetzel v. Liberty Mutual Insurance Co.,* 509 F.2d at 248-49, 256.[28] Due process requires only that the class members be adequately represented. *Sam Fox Publishing Co. v. United States,* 366 U.S. 683, 691, 81 S.Ct. 1309, 6 L.Ed.2d 604; *Hansberry v. Lee,* 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed.2d 22 (1940); *Gonzales v. Cassidy,* 474 F.2d 67, 74 (5 Cir. 973). The trial court may in its discretion in a class action certified under Rule 23(b)(2) direct that notice be given under Rule 23(d). *Souza v. Scalone,* 563 F.2d at 386; *Elliott v. Weinberger,* 564 F.2d at 1229.

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discretion exercising their equitable powers to fashion the most complete relief possible . . . ." 424 U.S. at 763-764, 96 S.Ct. at 1264. While § 706(g) does not refer specifically to procedural safeguards, the "broad equitable discretion" conferred on the trial courts would permit their consideration.

26. Rule 23(b)(2) provides:

> (b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (2) the party opposing the class had acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;
>
> . . . . .

27. See, *e. g., East Texas Motor Freight Systems, Inc. v. Rodriquez,* 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), aff'g, 505 F.2d 40, 51 (1974); *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 751, 755, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), which are both Rule 23(b)(2) class actions.



[23] Similar procedural safeguards are available in a class action brought by the EEOC even though it is not certified under Rule 23. The trial court need not require notice or allow absent members to opt-out when the EEOC sues, just as it is not required to do so under Rule 23 when a private litigant is the class representative. But the equitable powers of the trial court under Rule 23(d), which apply when a private litigant is the class representative, may be exercised under § 706(g) and the broad equitable powers recognized in Title VII actions.

By avoiding the Rule 23(a) certification decision, a step to which the private § 706 class representative is subject, the inevitable challenge to the EEOC as a class representative is avoided. The certification process would be time consuming and costly, and would serve no useful purpose in the final disposition of the case.[29]

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28. The view has been expressed that mandatory notice would be too inflexible a rule and would add little to a Rule 23(b)(2) class action. 3B Moore's Federal Practice, ¶ 23.55.

29. See Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of EEOC v. D. H. Holmes Co., supra* at 760. "(D)elays in the ultimate disposition of Title VII cases on the merits, increased motion practice, and further litigation are inevitable as a result of the Court's holding in *Holmes* while, on the other hand, no significant benefits can accrue as a result of Commission certification."

*Equitable Powers*

[24, 25] Broad equitable powers are vested in the federal courts under § 706(g), 42 U.S.C. § 2000e-5(g) of the Act. The courts are empowered to fashion such relief as the particular circumstances of the case may require. *Franks v. Bowman Transportation Co., supra,* 424 U.S. at 764, 96 S.Ct. 1251. Congress armed the courts with full equitable powers in Title VII cases. It is the historic purpose of equity to secure complete justice. The courts will be alert to adjust their remedies so as to grant the necessary relief. *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 418, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). The courts "must 'look to the practical realities . . . involved in reconciling competing interests'" in determining the "special blend of what is necessary, what is fair, and what is workable". *Teamsters v. United States, supra,* 431 U.S. at 375, 97 S. Ct. at 1875.

[26] General Telephone is concerned that it may be subjected to subsequent suits on the same issues, possible double payment of damage awards, and inconsistent judicial decisions if the EEOC is not required to qualify as a class representative when it brings this type of action. The EEOC suggests that a district court might properly exercise its discretion to order the issuance of an appropriate notice which informs the charging party and members of the class of the pendency of the Commission's action and their statutory right to intervene. Alternatively, the EEOC suggests that the disrict court may condition receipt of relief on the waiver of an individual's personal right of action.

We agree with the EEOC that courts may fashion appropriate orders to insure that defendants are not subjected to double payment or unnecessarily duplicative litigation. Under their broad equitable powers the courts may prescribe procedures and remedies which are fair and equitable to all parties.

***Conclusion***

We affirm the order of the district court denying General Telephone's motion to dismiss the class action aspects of this suit.



**APPENDIX B**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | |
|---|---|
| EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff,* v. GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al., *Defendant.* | CASE NO. C77-247M REPORT AND RECOMMENDATION |

FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington
NOV. 11, 1977
EDGAR SCOFIELD, *Clerk*
By....., *Deputy*

**I. *Introduction***

This is a sex discrimination suit brought by the Equal Employment Opportunity Commission against defendants General Telephone Company of the Northwest, Inc., West Coast Telephone Company of California, Inc., and Local Union No. 89, International Brotherhood of Electrical Workers. The action arises under Section 706(f)(1) and (3) of Title VII, Civil Rights Act of 1964, 42 U.S.C. §2000(e), *et seq.*

On August 15, 1977, the matter was referred to the undersigned as Special Master pursuant to Rule 53, Federal Rules of Civil Procedure, 42 U.S.C. §2000(e) - 5(f)(5) and Local Magistrates' Rule MR 21. At a preliminary pretrial conference held on September 26, 1977, the parties indicated that before discovery could proceed further it was necessary for the court to consider and rule upon Defendants' Motion to Dismiss the "Class Action Aspects" of the Plaintiff's First Amended Complaint. Accordingly, that motion and Plaintiff's Motion to Compel Answers to Interrogatories were briefed and argued before the under-

signed on October 26, 1977. The undersigned has entered an order with respect to the plaintiff's motion to compel, a copy of which is attached hereto, and this Report and Recommendation relates to the remaining motion to dismiss the "Class Action Aspects" of EEOC's First Amended Complaint.

## II. *Issue Before the Court*

The defendants moved to dismiss the "Class Action Aspects" of the complaint, arguing that the EEOC has failed to comply with the requirements of Rule 23 of the Federal Rules of Civil Procedure and Local Rule 23 by failing to plead all of the necessary class action allegations and further, by failing to move for certification within ninety days of the filing of the complaint. The EEOC argues that the provisions of Rule 23 are not applicable to actions brought by the EEOC, but that even if Rule 23 were applicable, the court should not dismiss, but should grant the EEOC leave to amend.

The basic issue before the court then, is whether the EEOC is required to comply with Rule 23 in order to bring suit on behalf of a class. Although there have been several district court decisions on the question, the only circuit court of appeals to address the question is the Fifth Circuit, which held that the EEOC is required to comply with Rule 23 in §706 (42 U.S.C. §2000(e) - 5) suits. *EEOC v. D. H. Holmes Co.*, 556 F. 2d 787 (5th Cir. 1977). The court found nothing in the Civil Rights Act or in Rule 23 to specifically exempt the EEOC from compliance, and so concluded that the rule should apply to the Commission.

The *Holmes* decision is contrary to the decisions of most district courts, including Judge Neill's decision in *EEOC v. Vinnell-Dravo-Lockheed-Manning*, 417 F. Supp. 575 (E.D. Wash. 1976). In that case, Judge Neill concluded that "while the courts have steadfastly required private litigants to comply with Rule 23, compliance with that Rule has not been required in cases where an agency of the government sought class relief from discriminatory employment practices." Se also *EEOC v. Pinkertons, Inc.*, 14 FEP 1431 (W.D. Pa. 1977); *EEOC v. CTS of Asheville, Inc.*, 13 FEP 852 (W.D. N.C. 1976); *EEOC v. Rexene Polymers*, 9 EPD 9922 (W.D. Tex. 1975); *EEOC v. Luth-*



*eran Hospital*, 7 EPD 9205 (E.D. Mo. 1974); *EEOC v. Mobil Oil*, 362 F. Supp. 786 (W.D. Mo. 1973).

None of the foregoing decisions are binding on this court, however, and the court is free to examine the question as a matter of first impression.

## III. *Summary of Conclusion*

I recommend that this court conclude that the EEOC is not required to comply with Rule 23 in order to bring an action on behalf of a class, for the following reasons:

(1) The Commission is not required to comply with Rule 23 in §707 (42 U.S.C. §2000(e) - 6) "pattern and practice" suits, and suits under §706 (42 U.S.C. §2000(e) - 5) of the Act should not be treated differently;

(2) The statute itself provides the necessary authority for the EEOC to bring suit on behalf of a class; and,

(3) It is both undesirable and impractical to require the EEOC to comply with Rule 23.

## IV. *Analysis*

(1) *Comparison with §707 Pattern and Practice Suits.*

Under the original Civil Rights Act of 1964, §706 of Title VII gave individuals the right to bring employment discrimination suits on behalf of themselves or a class. §707 gave the Attorney General the authority to bring "pattern and practice" suits against employers where discrimination consisted of more than isolated incidents. The authority of the EEOC in either case was limited to investigation and conciliation.

In 1972, dissatisfied with the progress made in eradicating employment discrimination, Congress amended the statute to allow the EEOC to sue on behalf of individuals (§706) and to bring pattern and practice suits (§707). The EEOC replaced the Attorney General as the plaintiff in §707 suits.

The result of the 1972 amendments was to make the two sections effectively the same in relation to the enforcement power of the EEOC. Today, the EEOC may bring suit under either §706 or §707, and may seek both

injunctive relief and affirmative relief in the form of back pay and retroactive seniority. See *U. S. v. Georgia Power*, 474 F. 2d 906 (5th Cir. 1973); *U. S. v. Allegheny-Ludlum*, 517 F. 2d 826 (5th Cir. 1975).

Both parties in the case at bar agree that there is no longer any essential difference between §706 and §707 suits brought by the EOC and that the applicability of Rule 23 should be the same under either section. If the EEOC is required to comply with Rule 23 under §706, it should also be required to comply under §707. This notion is supported by the legislative history. While debating the issue of whether to transfer §707 authority to the EEOC, Senator Harrison Williams, floor manager of the 1972 amendments, remarked:

> "There will be no difference between the cases that the Attorney General can bring under §707 as a 'pattern and practice' charge and those which the Commission may bring as a result of yesterday's decision to give the EEOC court enforcement powers. Frankly, the pattern and practice section becomes a redundancy in the law." 118 *Cong. Record*, p. 4081, February 16, 1972.

Senator Javits agreed by saying that "the EEOC . . . has the authority to institute exactly the same actions that the Department of Justice does under pattern and practice." 118 *Cong. Record*, p. 4081-2, February 16, 1972.

Clearly, the Attorney General was never required to comply with Rule 23 in order to bring a pattern and practice suit. See *International Brotherhood of Teamsters v. U. S.*, .... U. S. ...., 97 S. Ct. 1843 (1977); *U. S. v. Georgia Power Co.*, 474 F. 2d 906 (5th Cir. 1973); *U. S. v. Ironworkers, Local 86*, 443 F. 2d 544 (9th Cir. 1971). Defendants argue that the 1972 amendments changed the law to require compliance with Rule 23 when the EEOC was given "pattern and practice" authority. This contention has no support in the Legislation or in case law.

There is nothing in the statute to suggest that Congress intended Rule 23 to apply to the EEOC where it had not previously applied to the Attorney General. The 1972 amendments merely transferred the authority to bring



pattern and practice suits from the Attorney General to the EEOC. Absent express language in the statute, this court should not impose restrictions on the EEOC that were not imposed on the Attorney General. Furthermore, the legislative history appears to indicate that Congress had no intention of requiring the EEOC to comply with Rule 23 in "pattern and practice" suits. In the course of debate on the bill, Senator Javits also stated:

> "I have referred to the rules of civil procedure. I now refer specifically to Rule 23 of those rules, which is entitled Class Actions and which give the opportunity to engage in the Federal Court in class actions by properly suing parties. We ourselves have given permission to the EEOC to be a properly suing party." 118 *Cong. Record*, p. 4082, February 16, 1972.

I believe that the proper interpretation of that language is that Congress intended that the EEOC be permitted to bring "pattern and practice" suits, which are in effect class actions, without regard to Rule 23.

Decisional law, too, supports the notion that Rule 23 does not apply. In *Allegheny-Ludlum*, supra, the EEOC brought a pattern and practice suit without complying with Rule 23. In that case, the court recognized the distinction between government pattern and practice suits and private class actions: "It appears to us that [appellants'] real objective is to convert what began as a government pattern and practice suit into an eventual Rule 23 class action."

In the *Holmes* case, relied upon by the defendants, the court held that Rule 23 applied to the EEOC under §706, but it is interesting to note that in a footnote the court appeared to recognize that the Commission could refile the suit as a "pattern and practice" suit under §707, where it would not be required to comply with Rule 23. In view of the seemingly identical nature of the two sections, it would be anomalous to follow the *Holmes* decision.

(2) *Examination of the Statutory Authority.*

The Civil Rights Act, 42 U.S.C. §2000(e), *et seq.*, provides authority for the EEOC to bring civil suits whenever it has been unable to secure an acceptable conciliation agreement. The prerequisites for such a suit are clearly

set forth in the statute: a charge must be filed with the Commission within 180 days of the alleged act of discrimination; the charge must be served on the respondent within ten days of filing; the Commission must investigate the charge and make a finding of reasonable cause; and the Commission must attempt to resolve the matter through conciliation.

The Commission's authority derives solely from that statute. *EEOC v. Rexene Polymers,* 9 EPD 9922 (W.D. Tex. 1975). Nowhere in the statute is there any indication that the EEOC must meet any requirements in addition to those specified. Had Congress intended the Commission to be bound by Rule 23, the requirement should have been expressed in the statute. Congress saw fit to specifically require the EEOC to comply with the provisions of Rule 65 of the Federal Rules of Civil Procedure in connection with obtaining of temporary or preliminary injunction relief under §706(f)(2), but made no reference to compliance with Rule 23. The most reasonable conclusion to be drawn is that Congress did not intend to require the EEOC to comply with Rule 23.

(3) *Undesirability and Impracticality.*

The legislative history of the 1972 amendments reflects a desire on the part of Congress to strengthen the enforcement capability of the EEOC. The amendments grew out of Congressional dissatisfaction with the progress being made in eliminating employment discrimination.

> "... The persistence of discrimination and its detrimental effects requires a reaffirmation of our national policy of equal opportunity in employment. It is essential that seven years after the passage of the Civil Rights Act of 1964, effective enforcement procedures be provided to the Equal Employment Opportunity Commission to strengthen its efforts to reduce discrimination in employment." House Report No. 92-238, 1972 *U. S. Code Cong. and Admin. News,* 2139.

It seems unlikely that Congress would expand the enforcement power of the EEOC by giving it the right to sue, and then restrict it to the procedures available prior to the amendments. If the EEOC were bound by Rule 23, then its enforcement power would be no greater than that



of any individual, and the 1972 changes would be meaningless.

In *Holmes,* the Fifth Circuit suggested that Rule 23 would present no barrier to the EEOC, because, in the court's view, the Commission had standing to sue under Rule 23 and would be a representative "*par excellence.*" However, a review of the elements of Rule 23 demonstrates that, under present case law, the Commission would be effectively precluded from bringing any class suits at all.

Rule 23 provides that "one or more members of a class" may sue. Courts have consistently held that a representative plaintiff must be a member of the class he seeks to represent. *Sosna v. Iowa,* 419 U. S. 393 (1975); *Kuahulu v. Employers Insurance of Wausau,* 557 F. 2d 1334 (9th Cir. 1977); *DuPree v. U. S.,* 559 F. 2d 1151 (9th Cir. 1977). Clearly, the EEOC can never be a member of a class of employees who have been discriminated against.

Rule 23 also requires that the representative party fairly and adequately protect the interests of the class. This means that the interests of the representative must be co-extensive with the interests of the class, and the representative must demonstrate that there is no conflict of interest between himself and other class members. *DuPree v. U. S.,* 559 F. 2d 1151 (9th Cir. 1977); *Albertsons v. Amalgamated Sugar Company,* 503 F. 2d 459 (10th Cir. 1974). Using these standards, the EEOC would not be an adequate representative in most instances, since it has been consistently recognized that the EEOC and private litigants pursue different, and potentially conflicting, interests. *U. S. v. Allegheny-Ludlum,* 517 F. 2d 826 (5th Cir. 1975); *U. S. v. T.I.M.E. - D.C.,* 517 F. 2d 299 (5th Cir. 1975), rev'd on other grounds, .... U. S. ...., 97 S. Ct. 1843 (1977).

> "While the government may be willing to compromise in order to gain prompt, and perhaps nationwide relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restitution." *Rodriguez v. East Texas Motor Freight,* 505 F. 2d 40 (5th Cir. 1974), rev'd on other grounds.

The Commission is charged with bringing suit in order

to "vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address grievances of particular individuals." *U. S. v. Allegheny-Ludlum,* supra.

In recognition of these conflicting interests, courts have held that private individuals are not bound by judgments in suits brought by the EEOC. *EEOC v. Detroit Edison,* 515 F. 2d 301 (6th Cir. 1975); *U. S. v. Allegheny-Ludlum,* supra; *Williamson v. Bethlehem Steel Corporation,* 468 F. 2d 1201 (2d Cir. 1972). Under Rule 23, all class members are bound by the judgment. Rule 23(c).

It is clear that under these principles, the EEOC could not meet the requirements of Rule 23. Allowing the Commission to proceed under the rule, as *Holmes* suggests, would necessitate a significant departure from the present understanding of Rule 23. Therefore, if we require the EEOC to comply with Rule 23, we are left with two alternatives: either we allow the Commission to sue under Rule 23, thereby straining the interpretation of that Rule, or we significantly hinder the enforcement capability of the EEOC.

Neither alternative is satisfactory. The better rule is to allow the EEOC to bring suit without the encumbrance of Rule 23.

### V. *Conclusion*

For the foregoing reasons, I recommend that the court deny the motion to dismiss the class aspects of the complaint. In the event that the court should decide to follow the *Holmes* decision and require EEOC compliance with Rule 23, the court should nevertheless deny the motion to dismiss and grant the EEOC ninety days in which to file an amended complaint and to otherwise comply with Federal Rules of Civil Procedure 23 and Local Rule 23.

A proposed form of Order accompanies this Report and Recommendation.

DATED this 11th day of November, 1977.

/s/ PHILIP K. SWEIGERT
Philip K. Sweigert
United States Magistrate



## APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | |
|---|---|
| EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff,* v. GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al., *Defendants.* | CASE NO. C77-247M ORDER DENYING MOTION TO DISMISS CLASS ASPECTS OF THE COMPLAINT |

FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington
DEC. 21 1977
JOE R. ROMANE, *Clerk*
By....., *Deputy*

The Court has reviewed Defendants' Motion to Dismiss the Class Aspects of the Complaint, the legal memoranda of both parties, the records and files in this case, and the Report and Recommendation of the United States Magistrate herein:

It is therefore ORDERED:

(1) Said Report and Recommendation is approved and adopted;

(2) Defendants' Motion to Dismiss the Class Aspects of the Complaint is DENIED; and,

(3) The Clerk of this Court is directed to furnish uncertified copies of this Order to counsel for both parties and to the United States Magistrate.

DATED this 21st day of November, 1977.

/s/ WALTER T. MCGOVERN
Chief United States District Judge

## APPENDIX D
## PUBLIC HEALTH & WELFARE — CIVIL RIGHTS
## Title 42 U.S.C.

### § 2000e-5. Enforcement provisions— Power of Commission to prevent unlawful employment practices

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

**Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause**

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.



**State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings**

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the pro-

ceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

**Same; notification of State or local authority; time for action on charges by Commission**

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

**Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency**

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever



is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

**Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master**

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government,

govermental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed,



in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

**Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders**

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

**Provisions of sections 101 to 115 of Title 29 not applicable to civil actions for prevention of unlawful practices**

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

**Proceedings by Commission to compel compliance with judicial orders**

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

**Appeals**

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

**Attorney's fee; liability of Commission and United States for costs**

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Pub.L. 88-352, Title VII, § 706, July 2, 1964, 78 Stat. 259; Pub.L. 92-261, § 4, Mar. 24, 1972, 86 Stat. 104.



## APPENDIX E

## FEDERAL RULES OF CIVIL PROCEDURE

### Rule 23. Class Actions

**(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

**(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prose-

cution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

**(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and



each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

**(d) Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

**(e) Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

Supreme Court, U. S.
FILED
JAN 24 1980
MICHAEL RODAK, JR., CLERK

# APPENDIX

## IN THE
## Supreme Court of the United States

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**October Term, 1979**

**No. 79-488**

---

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al.,
*Petitioners,*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Respondent.*

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## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR CERTIORARI FILED SEPTEMBER 22, 1979
CERTIORARI GRANTED DECEMBER 10, 1979

## RELEVANT DOCKET ENTRIES


| *Date* | *Proceedings* | *Appendix Page No.* |
|---|---|---|
| *1977* | | |
| April 8 | Complaint | 2 |
| July 13 | First Amended Complaint | 7 |
| August 12 | Notice of Motion and Motion for Bifurcation | 12 |
| August 12 | Memorandum of Points and Authorities in Support of Motion for Bifurcation | 14 |
| August 15 | Order of Reference of Title VII Action | 22 |
| September 15 | Motion to Dismiss Class Action | 24 |
| November 11 | Report and Recommendation (see Pet. App. A-25 to A-32)..... Writ of Certiorari | |
| December 21 | Order Denying Motion to Dismiss Class Aspects of the Complaint (see Pet. App. A-33) ..... Writ of Certiorari | |
| December 29 | Defendant General Telephone's Motion for Reconsideration and Notice of Same | 26 |
| *1978* | | |
| January 17 | Order Granting Motion for Reconsideration and Amending Order filed December 21, 1977 re Appeal per 28 U.S.C. §1292(b) | 28 |
| April 4 | Order (by Court of Appeals granting permission to appeal) | 30 |
| *1979* | | |
| June 27 | Court of Appeals decision (see Pet. App. A-1 to A-24) ..... Writ of Certiorari | |

IN THE

# Supreme Court of the United States

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GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al.,
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v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Respondent.*

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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## APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Plaintiff,*

v.

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC.,

and

LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

and

WEST COAST TELEPHONE COMPANY OF CALIFORNIA, INC.,
*Defendants.*

CIVIL ACTION NO. C77-247M

COMPLAINT

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
APR. 11, 1977
EDGAR SCOFIELD, Clerk
By ....., Deputy

## JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 451, 1343 and 1345. This is an action authorized and instituted pursuant to Section 706(f)(1) and (3) of Title VII, Civil Rights Act of 1964 as amended, 42 U.S.C. Section 2000e *et seq.* (Supp. II, 1972), hereinafter referred to as "Title VII."



2. The unlawful employment practices alleged below were and are now being committed within the State of Washington, Western District of Washington, and elsewhere.

3. Plaintiff, Equal Employment Opportunity Commission (hereinafter, the "Commission"), is an agency of the United States of America charged with the administration, interpretation and enforcement of Title VII and is expressly authorized to bring this action by Section 706(f)(1), 42 U.S.C. Section 2000e-5(f)(1).

4. Since at least July 2, 1965, Defendant, General Telephone Company of the Northwest, Inc. (hereinafter "General Telephone"), has continuously been and is now a Washington corporation, doing business in the State of Washington and City of Everett, where it is engaged in providing telephone services to the public and has continuously and does now employ more than twenty-five employees.

5. Since at least July 2, 1965, General Telephone has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Section 701(b), (g) and (h) of Title VII, 42 U.S.C. Section 2000e-(b), (g) and (h).

6. Since at least July 2, 1965, Defendant Local Union No. 89, International Brotherhood of Electrical Workers (hereinafter "Local 89") has continuously been and is now an unincorporated association of participating employees which deals with General Telephone concerning terms and conditions of employment. Local 89's membership has continuously been and is now in excess of twenty-five and Local 89 is the certified representative of employees of General Telephone.

7. Since at least July 2, 1965, Local 89 has continuously been and is now a labor organization engaged in an industry affecting commerce within the meaning of Section 701(d) and (e) of Title VII, 42 U.S.C. Section 2000e-(d) and (e).

8. Defendant West Coast Telephone Company of California, Inc. (hereinafter "West Coast") is a subsidiary of General Telephone. Since at least July 2, 1965, it has operated General Telephone's facilities in California. It maintains common management personnel and general office headquarters with General Telephone and has continuously and does now employ more than twenty-five employees.

9. Since at least July 2, 1965, West Coast has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Section 701(b), (g) and (h) of Title VII, 42 U.S.C. Section 2000e-(b), (g) and (h).

10. More than thirty (30) days prior to the institution of this lawsuit, persons claiming to be aggrieved filed charges with the Equal Employment Opportunity Commission alleging violations of Title VII by Defendant General Telephone and Defendant Local 89. All conditions precedent to the institution of this lawsuit have been fulfilled.

11. Since July 2, 1965, and continuously up until the present time, Defendant General Telephone has intentionally engaged in unlawful employment practices at its facilities in Washington, Oregon, Idaho, Montana and California, in violation of Section 703(a) of Title VII.

12. Since July 2, 1965, and continuously up until the present time, Defendant West Coast has intentionally engaged in unlawful employment practices at its California facilities in violation of Section 703(a) of Title VII.



13. The unlawful employment practices engaged in by General Telephone and West Coast and referred to in paragraphs 11 and 12 above include, but are not limited to, the following:

A. Failing and refusing to give employees maternity leave of absence, on the same basis as temporary leave provided to employees suffering from other types of disabilities, because of their sex.

B. Excluding women from craft jobs which exclusion operates to limit the employment and advancement opportunities of women because of their sex.

C. Excluding women from managerial positions at General Telephone's facility in Beaverton, Oregon, because of their sex.

D. Failing to eliminate their unlawful employment practices and to correct the present effects of their past discrimination against women because of sex.

14. Since July 2, 1965, and continuously up until the present time, Defendant Local 89 has intentionally engaged in unlawful employment practices in its representation of General Telephone's employees in Washington, Oregon, Idaho and Montana, in violation of Section 703(c) of Title VII, by being a party to collective bargaining agreements with General Telephone which operate to deny pregnant female employees of General Telephone employment opportunities and benefits equal to those provided to male employees, and which operate to perpetuate the effects of General Telephone's previous discriminatory practices.

15. The effect of the policies and practices complained of in paragraphs 11, 12, 13 and 14 above has been to deprive women of equal employment opportunities and otherwise adversely affect their status as employees or applicants for employment because of their sex.

## PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully prays that this Court:

A. Grant a permanent injunction enjoining Defendants, their officers, agents, employees, successors, assigns and all persons in active concert or participation with them, from engaging in any employment practice which discriminates because of sex.

B. Order Defendants to institute and carry out policies, practices and affirmative action programs which provide equal employment opportunities for women, and which eradicate the effects of their past and present unlawful employment practices.

C. Order Defendants to make whole those persons adversely affected by the unlawful employment practices described herein, by providing appropriate back pay, with interest, in an amount to be proved at trial and other affirmative relief necessary to eradicate the effects of their unlawful employment practices.

D. Grant such further relief as the Court deems necessary and proper.

E. Award the Commission its costs in this action.

Dated: April 8, 1977

F. CANCINO
Assistant General Counsel

CHESTER F. RELYEA
Supervisory Trial Attorney

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ABNER W. SIBAL
General Counsel

WILLIAM L. ROBINSON
Associate General Counsel

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 "E" Street, N.W.
Washington, D.C. 20506



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Plaintiff,*

v.

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC.,

and

LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

and

WEST COAST TELEPHONE COMPANY OF CALIFORNIA, INC.,
*Defendants.*

CIVIL ACTION NO. C77-247M

FIRST AMENDED COMPLAINT

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AUG 1, 1977
EDGAR SCOFIELD, Clerk
By ....., Deputy

## JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 451, 1343 and 1345. This is an action authorized and instituted pursuant to Section 706(f)(1) and (3) of Title VII, Civil Rights Act of 1964 as amended, 42 U.S.C. Section 2000e *et seq.* (Supp. II, 1972), hereinafter referred to as "Title VII."

2. The unlawful employment practices alleged below were and are now being committed within the State of Washington, Western District of Washington, and elsewhere.

3. Plaintiff, Equal Employment Opportunity Commission (hereinafter, the "Commission"), is an agency of the United States of America charged with the administration, interpretation and enforcement of Title VII and is expressly authorized to bring this action by Section 706(f)-(1), 42 U.S.C. Section 2000e-5(f)(1).

4. Since at least July 2, 1965, Defendant, General Telephone Company of the Northwest, Inc. (hereinafter "General Telephone"), has continuously been and is now a Washington corporation, doing business in the State of Washington and City of Everett, where it is engaged in providing telephone services to the public and has continuously and does now employ more than twenty-five employees.

5. Since at least July 2, 1965, General Telephone has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Section 701(b), (g) and (h) of Title VII, 42 U.S.C. Section 2000e-(b), (g) and (h).

6. Since at least July 2, 1965, Defendant Local Union No. 89, International Brotherhood of Electrical Workers (hereinafter "Local 89") has continuously been and is now an unincorporated association of participating employees which deals with General Telephone concerning terms and conditions of employment. Local 89's membership has continuously been and is now in excess of twenty-five and Local 89 is the certified representative of employees of General Telephone.



7. Since at least July 2, 1965, Local 89 has continuously been and is now a labor organization engaged in an industry affecting commerce within the meaning of Section 701-(d) and (e) of Title VII, 42 U.S.C. Section 2000e-(d) and (e).

8. Defendant West Coast Telephone Company of California, Inc. (hereinafter "West Coast") is a subsidiary of General Telephone. Since at least July 2, 1965, it has operated General Telephone's facilities in California. It maintains common management personnel and general office headquarters with General Telephone and has continuously and does now employ more than twenty-five employees.

9. Since at least July 2, 1965, West Coast has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Section 701(b), (g) and (h) of Title VII, 42 U.S.C. Section 2000e-(b), (g) and (h).

10. More than thirty (30) days prior to the institution of this lawsuit, persons claiming to be aggrieved filed charges with the Equal Employment Opportunity Commission alleging violations of Title VII by Defendant General Telephone and Defendant Local 89. All conditions precedent to the institution of this lawsuit have been fulfilled.

11. Since July 2, 1965, and continuously up until the present time, Defendant General Telephone has intentionally engaged in unlawful employment practices at its facilities in Washington, Oregon, Idaho, Montana and California, in violation of Section 703(a) of Title VII.

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gaged in unlawful employment practices at its California facilities in violation of Section 703(a) of Title VII.

13. The unlawful employment practices engaged in by General Telephone and West Coast and referred to in paragraphs 11 and 12 above, include, but are not limited to, the following:

A. Failing and refusing to give employees maternity leave of absence, on the same basis as temporary leave provided to employees suffering from other types of disabilities, because of their sex.

B. Excluding women from craft jobs which exclusion operates to limit the employment and advancement opportunities of women because of their sex.

C. Excluding women from managerial positions because of their sex.

D. Failing to eliminate their unlawful employment practices and to correct the present effects of their past discrimination against women because of sex.

14. Since July 2, 1965, and continuously up until the present time, Defendant Local 89 has intentionally engaged in unlawful employment practices in its representation of General Telephone's employees in Washington, Oregon, Idaho and Montana, in violation of Section 703-(c) of Title VII, by being a party to collective bargaining agreements with General Telephone which operates to deny pregnant female employees of General Telephone employment opportunities and benefits equal to those provided to male employees, and which operate to perpetuate the effects of General Telephone's previous discriminatory practices.

15. The effect of the policies and practices complained of in paragraphs 11, 12, 13 and 14 above has been to deprive women of equal employment opportunities and otherwise adversely affect their status as employees or applicants for employment because of their sex.



## PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully prays that this Court:

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B. Order Defendants to institute and carry out policies, practices and affirmative action programs which provide equal employment opportunities for women, and which eradicate the effects of their past and present unlawful employment practices.

C. Order Defendants to make whole those persons adversely affected by the unlawful employment practices described herein, by providing appropriate back pay, with interest, in an amount to be proved at trial and other affirmative relief necessary to eradicate the effects of their unlawful employment practices.

D. Grant such further relief as the Court deems necessary and proper.

E. Award the Commission its costs in this action.

Dated: July 13, 1977

F. CANCINO
Assistant General Counsel

CHESTER F. RELYEA
Supervisory Trial Attorney

JOHN R. LOW
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FRITZ WOLLETT
Trial Attorney

ABNER W. SIBAL
General Counsel

WILLIAM L. ROBINSON
Associate General Counsel

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 "E" Street, N.W.
Washington, D.C. 20506

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Plaintiff,*
v.
GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC.,
and
LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
and
WEST COAST TELEPHONE COMPANY OF CALIFORNIA, INC.,
*Defendants.*

CIVIL ACTION NUMBER C-77-247 M

NOTICE OF MOTION AND MOTION FOR BIFURCATION

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AUG. 15, 1977
EDGAR SCOFIELD, Clerk
By ....., Deputy

NOTICE is hereby given that plaintiff Equal Employment Opportunity Commission will move the Court for and order bifurcating the issue of class liability from the issue of individual damages pursuant to Rule 42(b), Fed. R. Civ. Proc. This motion will be considered by the Honorable Walter T. McGovern, a judge of the above Court, at 9:30 a.m. on Friday, September 16, 1977, at the United States Courthouse, Seattle, Washington. Pursuant



to 7(b)(5), Local Civil Rules for the United States District Court for the Western District of Washington unless ordered by the Court, this motion will be decided without a hearing.

DATED: August 12, 1977

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Assistant General Counsel

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Supervisory Trial Attorney

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Senior Trial Attorney

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Plaintiff,*
v.
GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC.,
and
LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
and
WEST COAST TELEPONE COMPANY OF CALIFORNIA, INC.,
*Defendants.*

CIVIL ACTION NUMBER C-77-247 M

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR BIFURCATION

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AUG. 15, 1977
EDGAR SCOFIELD, Clerk
By ....., Deputy

The complaint herein alleges Company-wide patterns and practices of class discrimination and seeks back pay and other individual relief for a very large number of affected classmembers.[1] As in all pattern and practice actions brought under Title VII, a finding of class liability

1. Based upon the administrative record, there are in excess of 2,000 persons affected by the alleged exclusion of women from craft and management positions employed in Company facilities scattered over five states—Washington, Oregon, Idaho, Montana and California.



will entitle classmembers to present present personal claims for back pay and other specific relief; and, after all vacancies filled during the back pay period have been flow charted, back pay will be awarded to those eligible claimants who the court determines would have occupied those vacancies but for the class discrimination, provided their back pay records establish a loss of wages.[2] Because of the tension between the manageability problems attending such numerous and frequently diverse claimants on the one hand, and Title VII's policy of compensation for discrimination-caused economic injuries on the other, courts have taken a bifurcated approach to class actions and Government actions seeking back pay.[3]

The reasons are simply stated. Bifurcation allows suspension of discovery and trial of all individual liability issues until after there have been discovery, trial and findings as to class liability. To the extent that defendant prevails at the class liability stage ("Stage I"), the lengthy discovery and complex evidentiary problems concerning

2. See generally, *Teamsters v. United States,* .. U.S. .., 14 EPD ¶7579 (1977); *United States v. U.S. Steel Corp.,* 520 F.2d 1043 (5th Cir. 1975), *Swint et al. v. Pullman Standard et al.,* 539 F.2d 77 (5th Cir. 1976) and *Baxter v. Savannah Sugar Refining Corp.,* 495 F.2d 437 (5th Cir. 1974).

3. E.g.: *Teamsters v. United States, supra; United States v. U.S. Steel Corp., supra; Baxter v. Savannah Sugar Refining, Corp., supra; United States v. Masonry Contractors Assoc.,* 497 F.2d 871 (6th Cir. 1974); *Senter v. General Motors Corp.,* 532 F.2d 511 (6th Cir. 1976); *cert. den.,* .. U.S. .., 12 EPD ¶11,207 (1976); *Love v. Pullman Company,* 10 EPD ¶10,288 (D.C. Colo. 1975); *United States v. Lee Way Motor Freight, Inc.,* 7 EPD ¶9066 (W.D. Okla, 1973); *Ellison v. Rock Hill Printing and Finishing Co.,* 64 F.R.D. 415, 8 EPD ¶9627 (D.C. S.C. 1974); *Chastang v. Flynn and Emrich Co.,* 365 F. Supp. 957 (D.C. Md. 1973); *Paddison v. Fidelity Bank,* 60 F.R.D. 695, 7 EPD ¶9308 (E.D. Pa. 1973); *Piva v. Xerox Corp.,* 11 EPD ¶10,673 (N.D. Cal. 1975); *Waters v. Heublein, Inc.,* 11 EPD ¶10,620 (N.D. Cal. 1975); *Women's Committee v. National Broadcasting Co. et al.,* .. F. Supp. .., 12 EPD ¶11,135 (S.D. N.Y. 1976).

individual membership in the class and individual damages and other relief ("Stage II") will be unnecessary, and much judicial time and litigation expense will have been saved. If plaintiff prevails at Stage I, the likelihood of settlement is enhanced and judicial time may still be saved.[4] Absent a settlement, the parties of course will resume discovery on the back pay issue; but since there is little if any overlap in the evidence requirements of class discrimination (statistics and systemic practices) and individual discrimination (individual employment dates, qualifications, job interests, work histories, mitigation factors, etc.), final disposition of the action will not have been delayed by bifurcation.[5] Last, but not least, bifurcation preserves the option of referring all relief issues to the magistrate or a special master.[6]

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4. *Ellison v. Rock Hill Printing and Finishing Co., supra,* note 3. Back pay settlements were achieved after findings of liability in, e.g., *Robinson v. Lorillard,* 444 F.2d 791 (4th Cir. 1971) and *United States v. Georgia Power Co.,* 474 F.2d 906 (5th Cir. 1973). See also *Bryan v. Pittsburgh Plate Glass Co.,* .. F. Supp. .., 6 EPD ¶8935 (W.D. Pa. 1973) (settlement achieved prior to completion of the liability phrase); *Women's Committee v. National Broadcasting Co. et al., supra,* (same); and *EEOC v. Newspaper and Mail Deliverers' Union of New York and Vicinity et al.,* 384 F. Supp. 585 (S.D. N.Y.) (settlement achieved after trial on liability but prior to findings.)

Of course, "conciliation and voluntary settlement are the preferred means for resolving employment discrimination disputes," *United States v. Allegheny-Ludlum Industries,* 517 F.2d 826, 846 (5th Cir. 1975); so that, by enhancing settlement, bifurcation of Title VII trials serves an important public policy.

5. *Love v. Pullman Co., supra,* note 3; but see *Western Electric Co. v. Stern,* .. F.2d .., 12 EPD ¶11,232 (3rd Cir. 1976) (interrogatories seeking class representative's evidence as to individual discriminatees must be allowed at Stage I where relevant to a possible defense to class liability).

6. As with bifurcation, reference to the magistrate or a special mater saves judicial time and may produce settlement after the initial trial if defendants are found liable; and like bifurcation, it serves to relieve the tension between the manageability problems posed by large back pay actions and the statutory mandate that economic discriminatees be made whole. Thus it is a much used procedural device in back pay cases. See,



Rule 42(b) of the Federal Rules of Civil Procedure provides, in relevant part, that:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials may be conducive to expedition and economy, may order a separate trial of any . . . issues . . . .

Except in the Fifth Circuit bifurcation has been ordered as a matter of discretion. But the Fifth Circuit, believing that separate trials of Title VII class actions are not only "conducive" to expedition and economy, but necessary thereto, has long since mandated that procedure;[7] and now the Supreme Court, as demonstrated by the following excerpts from *Teamsters v. United States, supra,* has approved and apparently prescribed this Fifth Circuit rule:

> "The Court of Appeals was also correct in the view that individual proof concerning each class member's specific injury was appropriately left to proceedings to determine individual relief. In a suit brought by the Government under §707(a) of the Act the District Court's initial concern is in deciding whether the Government has proved that the defendant has engaged in a pattern or practice of discriminatory conduct". *Id* at note 24.

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e.g., *EEOC v. Steamfitters, L. 638 et al.,* .. F.2d .., 12 EPD ¶11,212 (2nd Cir. 1976); *Hairston v. McLean Trucking Co.,* 520 F.2d 226 (4th Cir. 1975); *United States v. U.S. Steel Corp., supra,* note 2; *Meadows v. Ford Motor Co.,* 510 F.2d 939 (6th Cir. 1975); *United States v. Detroit Edison Co.,* 515 F.2d 301 (6th Cir. 1975); *Sprogis v. United Airlines,* 444 F.2d 1194 (7th Cir. 1971); *United States v. Wood, Wire & Metal Lathers, L. 42,* 328 F. Supp. 429 (S.D. N.Y. 1971); *United States, v. Lee Way Motor Freight Inc., supra,* note 3; *Cooper v. Phillip Morris, Inc.,* 9 EPD ¶9929 (W.D. Ky. 1974); *Newman v. Avco,* 10 EPD ¶10,300 (M.D. Tenn. 1975); *Glus v. G.L. Murphy Co.,* 320 F. Supp. 563 (W.D. Pa. 1971); *Hill v. Western Electric Co.,* .. F. Supp. .., 12 FEP Cases 1157 (E.D. Va. 1976); *Ostapowitz v. Johnson Bronze Co.,* 7 EPD ¶9280 (W.D. Pa. 1974); *English v. Seaboard Coast Line R.R. Co.,* .. F. Supp. .., 13 EPD paras. 11,283 and 11,284 (S.D. Ga. 1976).

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7. *Baxter v. Savannah Sugar Refining Corp., supra.*

"At the initial, "liability" stage of a pattern or practice suit the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed. The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant. An employer might show, for example, that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination, or that during the period it is alleged to have pursued a discriminatory policy it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination." *Id.* at p. 4861.

"The employer's defense must, of course, be designed to meet the prima facie case of the Government. We do not mean to suggest that there are any particular limits on the type of evidence an employer may use. The point is that at the liability stage of a pattern or practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking. While a pattern might be demonstrated by examining the discrete decisions of which it is composed, the Government's suits have more commonly involved proof of the expected result of a regularly followed discriminatory policy. In such cases, the employer's burden is to provide a nondiscriminatory explanation for the apparently discriminatory result. See n. 20, and cases cited therein, *supra*." *Id.* at note 46.

"If an employer fails to rebut the inference that arises from the Government's prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy. Without any further evidence from the Government, a court's finding of a pattern or practice justifies an award of prospective relief." *Id.* at p. 4861.



"When the Government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief. The petitioners' contention in this case is that if the Government has not, in the course of proving a pattern or practice, already brought forth specific evidence that each individual was discriminatorily denied an employment opportunity, it must carry that burden at the second, "remedial" stage of trial. That basic contention was rejected in the *Franks* case. As was true of the particular facts in *Franks*, and is typical of Title VII pattern or practice suits, the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. The force of that proof does not dissipate at the remedial stage of the trial. The employer cannot, therefore, claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it has already been shown to have maintained a policy of discriminatory decisionmaking." *Id.* at p. 4861.[8]

Plaintiff views this language as requiring bifurcation of Title VII actions seeking individual relief for systemic discrimination.

## CONCLUSION

Teamsters involved a class of 400.[9] The instant action involves a class of 2,000.[10] Certainly, *Teamsters* represents

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8. As the Supreme Court makes explicit in *Teamsters*, "pattern and practice" cases call for the same bifurcated treatment irrespective of whether they are brought under Section 706(f)(1) or Section 707(a). *Id.* at p. 4861 and n. 45., citing *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976).

9. *Teamsters v. United States, supra,* at p. 4865.

10. See note 1.

compelling, if not binding, precedent for the disposition of this matter.

Respectfully submitted,

DATED: August 12, 1977

F. CANCINO
Assistant General Counsel

CHESTER F. RELYEA
Supervisory Trial Attorney

JOHN R. LOW
Senior Trial Attorney

ABNER W. SIBAL
General Counsel

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San Francisco, California 94102



CERTIFICATE OF SERVICE

It is hereby certified that copies of the foregoing NOTICE OF MOTION AND MOTION FOR BIFURCATION and MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR BIFURCATION have been mailed this day, postage pre-paid, to the following persons by depositing said copies in the U.S. Mail addressed as follows:

GEORGE H. DAVIES
VANCE, DAVIES, ROBERTS, REID & ANDERSON
Room 425, North Tower
100 W. Harrison Plaza
Seattle, Washington 98119

C. LEE COULTER
1800 Forty-First
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JAMES R. DICKENS
KARR, TUTTLE, KOCH, CAMPBELL, MAWER & MORROW
2600 Seattle-First National Bank Bldg.
Seattle, Washington 98154

FRITZ WOLLETT
Trial Attorney

Dated: August 12, 1977

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | |
|---|---|
| EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff,* v. GENERAL TELEPHONE CO. OF THE NORTHWEST, INC., et al, *Defendants.* | NO. C77-247M ORDER OF REFERENCE OF TITLE VII ACTION |

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AUG. 15, 1977
EDGAR SCOFIELD, Clerk
By ....., Deputy

The Court finds that this cause cannot be scheduled for trial within one hundred and twenty days after issue has been joined and that it should therefore be referred to the United States Magistrate pursuant to Rule 53, Fed. R. Civ. P., and 42 U.S.C. Sec. 2000e-5(f)(5), and local Magistrate's Rule MR 21.

Accordingly, IT IS ORDERED that this cause be and it hereby is referred to United States Magistrate Philip Sweigert as Special Master, to hear this matter on the merits and thereafter to report to the Court with recommended Findings of Fact, Conclusions of Law and Disposition. That report shall be subject to review by this Court, in accordance with the provisions of Rule 53(e), Fed. R. Civ. P. No transcript of the evidence need be filed with the



report of the Special Master unless one or more of the parties arranges for the preparation and filing thereof.

All pretrial or trial dates previously set by this Court are hereby vacated.

The Clerk of this Court is directed to send an uncertified copy of this order to the United States Magistrate and to all counsel of record.

DATED this 15th day of August, 1977

WALTER T. McGOVERN
Chief United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Plaintiff,*
v.
GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC.,
and
LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
and
WEST COAST TELEPHONE COMPANY OF CALIFORNIA, INC.,
*Defendants.*

CIVIL NO. C77-247M

MOTION TO DISMISS CLASS ACTION

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEP. 16, 1977
EDGAR SCOFIELD, Clerk
By ....., Deputy

RECEIVED
SEP. 16, 1977
PHILIP K. SWEIGERT
U.S. MAGISTRATE

COME NOW the defendants, General Telephone Company of the Northwest, Inc., and West Coast Telephone Company of California, Inc., and move this Court for an



order dismissing the class action aspects of plaintiff's complaint.

DATED this 15th day of September, 1977.

JAMES R. DICKENS
of KARR, TUTTLE, KOCH, CAMPBELL, MAWER & MORROW
Attorneys for Defendants
General Telephone Company of the Northwest, Inc., and
West Coast Telephone Company of California, Inc.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Plaintiff,*
v.
GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC.,
and
LOCAL UNION No. 89, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
and
WEST COAST TELEPHONE COMPANY OF CALIFORNIA, INC.,
*Defendants.*

No. C77-247M

DEFENDANT GENERAL TELEPHONE'S MOTION FOR RECONSIDERATION AND NOTICE OF SAME

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEC. 29, 1977
JOE R. ROMANE, Clerk
By ....., Deputy

COME NOW the defendants, General Telephone Company of the Northwest, Inc. and West Coast Telephone Company of California, Inc., and move this Court for reconsideration of its Order filed December 21, 1977 (mistakenly dated November 21, 1977) denying defendants' request for the certification of the class action aspects of this case for appeal to the Court of Appeals pursuant to 28 U.S.C. §1292(b). This motion is based on the Memorandum in Support of Motion for Reconsideration, which is filed herewith, and the other pleadings already of record.



Notice is hereby given that this motion for reconsideration will be presented to the Court on Friday, January 13, 1978, at 9:30 a.m. in accordance with Civil Rule 6(d), as amended, of the Local Rules, Western District of Washington. Pursuant to Civil Rule 7(b)(5) of the Local Rules, there will not be oral argument unless so ordered by the Court.

DATED this 29th day of December, 1977.

JAMES R. DICKENS and
RICHARD J. OMATA
of KARR, TUTTLE, KOCH, CAMPBELL, MAWER & MORROW, P.S.
Attorneys for Defendants
General Telephone Company of the Northwest, Inc. and West Coast Telephone Co. of California, Inc.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | |
|---|---|
| EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff,* v. GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al, *Defendants.* | NO. C77-247M ORDER GRANTING MOTION FOR RECONSIDERATION AND AMENDING ORDER FILED DECEMBER 21, 1977 RE APPEAL PER 28 U.S.C. §1292(b) |

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
JAN. 17, 1978
JOE R. ROMANE, Clerk
By ....., Deputy

The Court has reviewed Defendant's Motion for Reconsideration of the Court's decision regarding certification for immediate appeal its Order filed December 21, 1977, the legal memoranda of the parties, and the records and files in this case:

It is therefore ORDERED:

(1) Defendants' Motion for Reconsideration and alternative request that the Court's Order filed December 21, 1977 be certified for immediate appeal pursuant to 28 U.S.C. §1292(b) is GRANTED;



(2) The Order filed December 21, 1977 (dated November 21, 1977) is hereby amended to include the following statement:

"The Court is of the opinion that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion, namely, whether the Equal Employment Opportunity Commission is required to comply with Rule 23 of the Federal Rules of Civil Procedure in order to bring suit on behalf of a class, and that an immediate appeal from this Order as authorized by 28 U.S.C. §1292(b) may materially advance the ultimate termination of this litigation."

(3) An application for an appeal pursuant to 28 U.S.C. §1292(b) shall not stay discovery in this case.

The Clerk of this Court is directed to furnish uncertified copies of this Order to all counsel of record and to the United States Magistrate.

DATED this 17th day of January, 1978.

WALTER T. McGOVERN
Chief United States District Judge

Presented by:

JAMES R. DICKENS
of KARR, TUTTLE, KOCH, CAMPBELL,
MAWER & MORROW, P.S.
Attorneys for Defendants, General Telephone Company of the Northwest, Inc. and West Coast Telephone Company of California, Inc.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION,
*Plaintiff-Respondent,*
v.
GENERAL TELEPHONE CO. OF THE NORTHWEST, INC.,
and
WEST COAST TELEPHONE CO. OF CALIFORNIA, INC.,
*Defendants-Petitioners,*
and
LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
*Defendant.*

No. 78-8017
CIV D.C.
77-247
Western
Washington,
Seattle
ORDER

FILED
APR. 4, 1978
EMIL E. MELFI, JR., Clerk
U. S. COURT OF APPEALS

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
APR. 6, 1978
JOE R. ROMANE, Clerk
By ....., Deputy

Before: WRIGHT and SNEED, Circuit Judges

Upon due consideration, the Court issues the following order:

(a) the petition for permission to appeal is granted; and



(b) the motion for expedited hearing is denied without prejudice to its renewal after briefing is completed.

/s/ JOSEPH T. SNEED
United States Circuit Judge

DEC 7 PAGE 2

Supreme Court, U.S.
FILED
NOV 28 1979
MICHAEL RODAK, JR., CLERK

No. 79-488

# In the Supreme Court of the United States

OCTOBER TERM, 1979

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., ET AL., PETITIONERS

*v.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

LEROY D. CLARK
*General Counsel*

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*Assistant General Counsel*

VINCENT BLACKWOOD
*Attorney*
*Equal Employment Opportunity Commission*
*Washington, D.C. 20506*

# In the Supreme Court of the United States

OCTOBER TERM, 1979

---

No. 79-488

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., ET AL., PETITIONERS

*v.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**BRIEF FOR THE RESPONDENT**

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-24) is reported at 599 F. 2d 322. The report and recommendation of the magistrate (Pet. App. A-25 to A-32), which was approved and adopted by the district court (Pet. App. A-33), is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on June 27, 1979. The petition for a writ of certiorari was filed on September 22, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission has authority under Section 706(f)(1) of Title VII of the Civil Rights Act of 1964 to seek relief from discriminatory practices affecting a class of individuals without being certified as a class representative under Rule 23 of the Federal Rules of Civil Procedure.

## STATUTE INVOLVED

Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5, is reproduced in the Appendix to the petition (Pet. App. A-34 to A-40).

## STATEMENT

The Equal Employment Opportunity Commission instituted this suit under Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1), against General Telephone Company of the Northwest, Inc., its subsidiary West Coast Telephone Company of California, Inc., and Local Union No. 89, International Brotherhood of Electrical Workers. The complaint, as amended, alleges that General Telephone discriminates against female employees with respect to assignment to craft jobs and managerial positions throughout the company. The complaint also alleges that General Telephone's maternity leave policies violate Title VII. The Commission seeks injunctive relief, as well as back pay, for individuals affected by the challenged practices (Pet. App. A-7).

The allegations in the complaint are based on information obtained by the Commission in the investigation of charges of discrimination filed by four individuals against General Telephone and the union. As a result of these investigations the Commisson found reasonable cause to believe that General Telephone was discriminating against female employees in the manner



alleged in the complaint. After efforts at conciliation proved unsuccessful, the Commission instituted this lawsuit (Pet. App. A-7 n.1).

The district court referred the case to a magistrate for trial. Thereafter, General Telephone filed a motion asking the court to dismiss the "class action aspects" of the Commission's complaint (Pet. App. A-25). The company argued that, because the Commission had not moved for certification as a class representative pursuant to Fed. R. Civ. P. 23 within the time limit set by local Rule 23 of the Western District of Washington, no relief could be obtained for anyone in this case except the named individual employees whose charges gave rise to the complaint. The magistrate recommended that this motion be denied, and the district court adopted that recommendation (Pet. App. A-25 to A-33).

An interlocutory appeal from this ruling was certified pursuant to 28 U.S.C. 1292(b). The court of appeals affirmed, holding that the Commission could obtain relief under Section 706 of Title VII for a class of individuals harmed by discrimination without being certified as a class representative under Rule 23 (Pet. App. A-1 to A-24). The court of appeals noted that neither the terms of Rule 23 nor Title VII require class certification and that, in the context of a Commission suit, the class certification process would be time consuming and costly and would serve no useful purpose (Pet. App. A-12 to A-23).

## ARGUMENT

1. Although the Commission believes that the court of appeals was correct in holding that the Commission need not be certified as a class representative under Rule 23 in order to obtain relief pursuant to Section 706(f)(1) for a group of individual victims of unlawful employment discrimination, we join the petitioner in urging the Court

to grant the petition for a writ of certiorari. As petitioner has pointed out, the decision in this case is in direct conflict with the decision of the Fifth Circuit in *EEOC* v. *D.H. Holmes Co.*, 556 F. 2d 787 (1977), cert. denied, 436 U.S. 962 (1978).[1] There is also a substantial split among the district courts that have decided this question.[2] As a consequence, the Commission is faced with conflicting procedural requirements for obtaining relief for victims of discrimination in federal courts. Moreover, the Commission faces uncertainty as to which procedure to follow in the courts that have not yet decided the question. Because this uncertainty impedes the Commission's efforts to enforce Title VII, this Court should resolve the conflict among the lower courts.

2. We note that the conflict presented in this case concerning the applicability of Rule 23 to Commission enforcement actions may also affect litigation under a variety of statutes other than Title VII. There are many federal statutes that authorize private actions and also provide for governmental suits that may benefit individuals. These statutes include the fair housing provisions of the Civil Rights Act of 1968, 42 U.S.C. 3613, the Equal Credit Opportunity Act, 15 U.S.C. 1691e(h), Titles II, III, and IV of the Civil Rights Act of 1964, 42 U.S.C. 2000a-5, 2000b, 2000c-6, the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132, the Equal Pay Act of 1963, 29 U.S.C. 206(d), and the Fair Labor Standards Amendment of 1977, 29 U.S.C. (Supp.

[1]The Commission petitioned for a writ of certiorari in the *D.H. Holmes* case.

[2]See Pet. 5-6 n.1 for a list of conflicting district court decisions. See also *EEOC* v. *Mid-City Care Center*, 20 Empl. Prac. Dec. para. 30,275 (W.D. Tenn. 1979), holding that Rule 23 does not apply to Commission suits under Section 706 of Title VII.



I) 216(c). For example, the question whether Rule 23 applies to a government enforcement action under the Equal Pay Act is presently pending before the Fifth Circuit in *Marshall* v. *University of Texas*, No. 78-1787.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

LEROY D. CLARK
*General Counsel*

JOSEPH T. EDDINS
*Associate General Counsel*

BEATRICE ROSENBERG
*Assistant General Counsel*

VINCENT BLACKWOOD
*Attorney*
*Equal Employment Opportunity Commission*

NOVEMBER 1979

DOJ-1979-11

Supreme Court, U.S.
FILED
JAN 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-488

IN THE

# Supreme Court of the United States

October Term, 1979

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GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al.,
*Petitioners,*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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# BRIEF OF PETITIONERS

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**IN THE**

# Supreme Court of the United States

**October Term, 1979**

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**No. 79-488**

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al.,
*Petitioners,*

**v.**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# BRIEF OF PETITIONERS

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## OPINIONS BELOW

The June 27, 1979 opinion of the court of appeals (Pet. App. A-1 to A-24) is reported at 599 F.2d 322 (9th Cir. 1979). The report and recommendation of the magistrate on November 11, 1977 (Pet. App. A-25 to A-32), which was approved and adopted by the district court (Pet. App. A-33), is not officially reported, but it is in 16 Fair Empl. Prac. Cas. 476 (W.D. Wash. 1977).

## JURISDICTION

The judgment of the court of appeals was entered on June 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission must comply with the class certification requirements of Rule 23 of the Federal Rules of Civil Procedure when it brings suit on behalf of a class under Section 706(f)(1) of Title VII of the Civil Rights Act of 1964.

## STATUTE INVOLVED

Section 706 of Title VII, Civil Rights Act of 1964, 78 Stat. 259, as amended, 42 U.S.C. §2000e-5 (Pet. App. A-34 to A-40).

See also, Rule 23 of the Federal Rules of Civil Procedure (Pet. App. A-41 to A-43).

## STATEMENT

The Equal Employment Opportunity Commission (EEOC or Commission) filed suit in United States District Court, Western District of Washington, on April 11, 1977 against defendants General Telephone Company of the Northwest, Inc. and its subsidiary, West Coast Telephone Company of California, Inc. (hereinafter referred to collectively as GTNW), and defendant Local Union No. 89, International Brotherhood of Electrical Workers (A. 2-6). The complaint stated that the action was "authorized and instituted pursuant to Section 706(f)(1) and (3) of Title VII, Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e *et seq.* (Supp. II, 1972)" (A. 2). The complaint was precipitated by charges filed with the EEOC under Section 706 by four female employees of GTNW. 599 F.2d at 325 n. 1 (Pet. App. A-7 n. 1) (R. 24 & 27). The Commission, however, did not limit the relief it sought to the four charging parties. Instead the complaint, as amended on August 1,



1977, alleged that GTNW discriminated against women throughout the company with regard to maternity leave, access to craft jobs, and opportunities for promotion to managerial positions (A. 7-11). The complaint sought broad relief, including "appropriate back pay", for all "persons adversely affected by the unlawful employment practices" alleged in the amended complaint (A. 11).

The EEOC did not allege in the original complaint or in the amended complaint that this was a class action under Rule 23 of the Federal Rules of Civil Procedure (A. 1-11). Furthermore, no action was taken to have the case certified as a class action in accordance with Rule 23. On August 15, 1977, however, the EEOC moved "the Court for an order bifurcating the issue of *class* liability from the issue of individual damages pursuant to Rule 42(b), Fed. R. Civ. Proc." (emphasis added) (A. 12). In support of its motion the EEOC filed a memorandum of authorities in which it characterized the complaint as alleging "Company-wide patterns and practices of class discrimination and [seeking] back pay and other individual relief for a very large number of affected class-members", which it estimated were "in excess of 2,000 persons . . . scattered over five states—Washington, Oregon, Idaho, Montana and California" (A. 14). Throughout its memorandum the EEOC continued to refer to this action as a "pattern and practice action" and a "class action" (A. 14-19). Also on August 15, 1977, pursuant to §706(f)(5) of Title VII, 42 U.S.C. §2000e-5(f)(5), the court ordered the action referred to a United States magistrate (A. 22-23).

On September 16, 1977 GTNW filed a motion to dismiss the class action aspects of the EEOC's complaint (A. 24-25). The magistrate issued a Report and Recommendation

on November 11, 1977 (Pet. App. A-25 to A-32) in which he concluded that the EEOC did not have to comply with Rule 23, rejecting the opposite conclusion of the Court of Appeals for the Fifth Circuit in *EEOC v. D. H. Holmes*, 556 F.2d 787 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978). On December 21, 1977 the district court approved and adopted the report and recommendation of the magistrate (Pet. App. A-33). GTNW moved for reconsideration and requested that it be permitted to file an interlocutory appeal on the Rule 23 issue pursuant to 28 U.S.C. §1292-(b) (A. 26-27). The district court amended its earlier order on January 17, 1978 and certified it for an immediate interlocutory appeal (A. 28-29). The Court of Appeals for the Ninth Circuit granted the petition for permission to appeal on April 4, 1978 (A. 30).

The court of appeals, on June 27, 1979, through the district court judge sitting by designation, affirmed the district court conclusion that the EEOC did not have to comply with Rule 23 (Pet. App. A-1 to A-24). GTNW petitioned for a writ of certiorari on September 22, 1979, which this Court granted December 10, 1979.

## SUMMARY

The Federal Rules of Civil Procedure apply to all suits in federal court, including those by the EEOC, unless exempted by Rule 81, and it does not contain an exemption for the EEOC.

While Congress can supersede the federal rules, its intent to do so must be clear. The legislative history on the 1972 amendments to Title VII (which gave the EEOC authority to proceed under §706) suggests, however, that the EEOC was granted court-enforcement authority only with the clear understanding it would be bound by the



federal rules. Further, the EEOC was given specific standing to be a "properly suing" party under Rule 23 under these amendments. Congress knew how to make exemptions from the federal rules and did so during the 1972 amendments for magistrate referrals under Rule 53, but it did not exempt EEOC class actions from Rule 23.

The EEOC can comply with the class certification requirements of Rule 23 and it is desirable that it do so. Congress has authorized the EEOC to be a member of the class and to sue on its behalf, it would be an excellent representative with its resources and expertise, and any conflicts between it and the class are likely to be no greater than in any other class action. It seeks much the same relief as would the individual charging parties if they had sued directly, which also would be in the public interest, and they would be required to comply with Rule 23; so should the EEOC.

The court of appeals suggested the problems created by failing to apply Rule 23 could be obviated by reliance upon the court's equitable powers under §706(g). This approach should be rejected as the purpose of §706(g) was to permit the fashioning of substantive relief to make whole aggrieved individuals—not to circumvent a long-established procedural rule. Use of §706(g) in this respect would signal a return to pre-1966 actions and, undesirably, would require each court to make individual decisions case-by-case, which was the course of treatment Rule 23 was designed to eliminate.

There are numerous policy reasons why Rule 23 should apply to EEOC actions under §706: binding effect upon the class members of a decision or settlement, thereby avoiding subsequent and multiple litigation; early defini-

tion as to the size and scope of the class; identity of adverse interests; better judicial control of the action and settlement; procedural fairness to defendant employers (if they will be bound to the class if they lose, the class should be controlled by the decision if the employer prevails); potential protection of class members who may be relying upon the EEOC, only to discover it has decided not to seek relief for them; and protection against abuse of class actions.

The failure to require the Attorney General to comply with Rule 23 for pattern or practice actions under §707 prior to the 1972 amendments to Title VII is inconclusive authority for not requiring the EEOC to so comply under §706. This is because the issue of Rule 23 applicability was never raised as to §707 actions by the Attorney General, and he primarily sought injunctive relief. It was not until the Fifth Circuit in 1973 authorized back pay under §707 that the issue of Rule 23 took on added importance.

The general applicability of the federal rules, the legislative history to the 1972 amendments, and strong policy reasons compel a conclusion that the EEOC should be held responsible for complying with the class certification requirements of Rule 23.

## ARGUMENT

### 1. The EEOC Is Bound By the Federal Rules of Civil Procedure as Is Any Other Litigant

The Ninth Circuit recognized that:

> Rule 1 of the Federal Rules of Civil Procedure states that the federal rules "govern the procedure in the United States district courts in all suits of a civil nature . . . with the exceptions stated in Rule 81."

599 F.2d at 327 (Pet. App. A-10).

The court of appeals went on to note that Rule 81 did "not contain an exemption for suits brought by the EEOC



under Title VII." *Id.* n. 5. But then the court appeared to conclude, contrary to its earlier concurrence as to the applicability of the federal rules to Title VII suits, that because Rule 23 did not state it applied to "actions brought by the EEOC to enforce Title VII rights," the EEOC did not have to comply with Rule 23. 599 F.2d at 328, 333 (Pet. App. A-11, A-21). GTNW contends the court of appeals erred in this regard in which it apparently, and improperly, shifted the burden of proof on exemption from the federal rules in general, and Rule 23 in particular, from the party seeking the exemption (the EEOC) to GTNW, which was required to demonstrate with specificity that Rule 23 applied.

This Court has impliedly confirmed that the Federal Rules of Civil Procedure apply to actions by the government. *United States v. Procter & Gamble,* 356 U.S. 677, 681, 78 S. Ct. 983, 21 L.Ed 1077 (1958). This general principle is uniformly accepted by the lower courts and commentators.[1] Since the EEOC is not specifically exempt from Rule 23 under this analysis, we turn to the question of whether there is some other basis for its exemption.

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1. In *United States v. General Motors Corp.*, 2 F.R.D. 528 (N.D. Ill. 1942), the court rejected the government's claim that it was not bound by Fed. R. Civ. P. 33 because the rule did not specifically mention the United States.

> But, counsel contends, it appears from the rule itself that it was not intended to apply to the United States because the United States is not mentioned in the rule, citing in support thereof 1 Blackstone's Commentaries, 261 . . . .
>
> • • • •
>
> And that the rules generally apply to the United States is shown by the provisions of Rule 12 extending the time in which the United States may plead.
>
> To hold that the rules do not apply to the United States except where it is particularly mentioned would lead to absurd results. Then there would be no rule in such cases as to many matters of procedure.

2 F.R.D. at 529-30.

*Accord, Sperando v. Milk Drivers & Dairy Employees Local Union*

[Footnote 1 continued on next page.]

**2. Congress Does Have the Power to Supersede the Federal Rules, But Unless It Clearly Expresses an Intent to Do So, Subsequently Enacted Statutes Must Be Construed to Harmonize With the Federal Rules**

While this Court has not specifically ruled upon the issue, it is an accepted principle in the lower courts that, while Congress may statutorily supersede any or all of the Federal Rules of Civil Procedure, its intent to do so must clearly appear or the subsequently enacted statute will be construed to harmonize with the Rules.[2]

This Court has held, in an analogous area, when discussing the effect of a later Congressional enactment upon prior legislation, that amendments by implication are not favored. *United States v. Welden,* 377 U.S. 95, 84 S. Ct. 1082, 12 L. Ed. 2d 152 (1964); *Silver v. New York Stock Exchange,* 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963). GTNW contends that the Court should keep this principle in mind in reviewing the history of the 1972 Amendments to Title VII as even the Ninth Circuit con-

#537, 334 F.2d 381, 384 (10th Cir. 1964); *Mitchell v. Bass,* 252 F.2d 513 (8th Cir. 1958); *Durkin v. Pet Milk Company,* 14 F.R.D. 385, 390 (W.D. Ark. 1953); *Walling v. Richmond Screw Anchor Co.,* 4 F.R.D. 265, 269 (E.D. N.Y. 1943); and 2 Moore's Federal Practice ¶1.05, at 241-42 (2d ed. 1979). If this were not the case, we would have a situation where the government could selectively pick and choose those federal rules by which it would be bound, which is what GTNW contends the EEOC is attempting to do.

The United States as a party is specifically referenced only in some of the Federal Rules of Civil Procedure. Do the remaining rules not apply to actions in which the United States is a party? The very question suggests a contrary answer.

2. *United States v. Gustin-Bacon Div.,* 426 F.2d 539, 542 (10th Cir. 1970), *cert. denied,* 400 U.S. 832 (1970). This case also involved the 1964 Civil Rights Act, although prior to the 1972 amendments. The Tenth Circuit did conclude that the federal rules applied to litigation under the Civil Rights Act. *See also In re General Motors Corporation Interchange Litigation,* 594 F.2d 1106 (7th Cir. 1979), in which it was argued that Rule 23(a) was not applicable to class actions maintained under the Magnuson-Moss Act, a position which the Seventh Circuit rejected at 1134-35 n. 50.



cluded that the "legislative history likewise fails to express clearly an intention that the EEOC comply with or be exempted from the class action certification requirement." *General Telephone, supra,* 599 F.2d at 328 (Pet. App. A-12). As a consequence, these general principles of construction require a conclusion that the EEOC is bound by Rule 23 as is any other litigant.

**3. The Legislative History of Title VII**

We must review the legislative history of Title VII in an attempt to determine the intent of Congress because the lower courts, and the commentators, have split in their respective views as to whether the history suggests an intent that Rule 23 apply to §706 actions by the EEOC.[3]

3. District court decisions in which Rule 23 has been held to apply to §706 actions by the EEOC include: *Local 194 v. Standard Brands,* 74 C 0587, Slip Op. at 15-21 (N.D. Ill., December 6, 1979); *EEOC v. Westinghouse Electric Corp.,* 20 Fair Empl. Prac. Cas. 120 (M.D. N.C. 1979); *EEOC v. Delaware Trust Co.,* 81 F.R.D. 448, 18 Fair Empl. Prac. Cas. 1521 (D. Del. 1979); *Harris v. Anaconda Aluminum Co.,* 16 Empl. Prac. Dec. ¶8265 (N.D. Ga. 1978); *EEOC v. Page Eng'r Co.,* 17 Fair Empl. Prac. Cas. 1638 (N.D. Ill. 1978); *Niedhardt v. D. H. Holmes Co.,* 13 Fair Empl. Prac. Cas. 449 (E.D. La. 1976), *aff'd, EEOC v. D. H. Holmes Co.,* 556 F.2d 787 (5th Cir. 1977), *cert. denied,* 436 U.S. 962 (1978); and *EEOC v. Continental Oil Co.,* 393 F. Supp. 167 (D. Colo. 1975), *aff'd on other grounds,* 548 F.2d 884 (10th Cir. 1977). *See also EEOC v. Datapoint Corp.,* 12 Fair Empl. Prac. Cas. 1133 (W.D. Tex. 1975), *aff'd in part,* 570 F.2d 1264 (5th Cir. 1978); *EEOC v. Akron Nat'l Bank & Trust Co.,* 78 F.R.D. 684 (N.D. Ohio 1978); and *EEOC v. Carter Carburetor,* 76 F.R.D. 143 (E.D. Mo. 1977), mandamus issued, 577 F.2d 43 (8th Cir. 1978), *cert. denied,* 99 S. Ct. 865 (1979).

This position that Rule 23 applies to EEOC §706 action is supported by Bumpass, *The Application of Rule 23 of the Federal Rules of Civil Procedure to Actions Brought by the Equal Employment Opportunity Commission,* 29 Case W. Res. L. Rev. 343 (1979), and Comment, *Certification of EEOC Class Suits Under Rule 23,* 46 U. Chi. L. Rev. 690 (1979).

District court decisions in which Rule 23 has been held not to apply to §706 actions by the EEOC include: *EEOC v. Federal Reserve Bank,* 21 Fair Empl. Prac. Cas. 742 (W.D. Tenn. 1979); *EEOC v. Mid-City Care Center,* 20 Empl. Prac. Dec. ¶30,275 (W.D. Tenn. 1979); *EEOC*

[Footnote 3 continued on next page.]

Title VII of the Civil Rights Act of 1964[4] created an individual cause of action for certain types of discrimination but did not permit the EEOC to initiate its own actions.[5] The EEOC's powers were restricted to investigation of charges, making findings related thereto, and seeking voluntary elimination of unlawful employment practices.[6] Under §706 of Title VII the charging party could sue in district court if the EEOC was unable to conciliate the charge,[7] and under §707 the Attorney General was authorized to bring suit in district court if he had "reasonable cause" to believe there was a "pattern or practice" of discrimination.[8]

In 1972 Congress amended Title VII by the Equal Employment Opportunity Act of 1972.[9] The result was that the EEOC was permitted to file actions in federal district court

*v. Bumble Bee Seafoods*, 19 Empl. Prac. Dec. ¶9160 (D. Ore. 1979); *EEOC v. Stroh Brewery*, 19 Empl. Prac. Dec. ¶9226, 19 Fair Empl. Prac. Cas. 1099 (E.D. Mich. 1979); *EEOC v. Singer Controls Co. of America*, 18 Fair Empl. Prac. Cas. 309 (N.D. Ohio 1978); *EEOC v. Raymond Metal Prods. Co.*, 17 Fair Empl. Prac. Cas. 206 (D. Md. 1978); *EEOC v. Schlueter Mfg. Co.*, 17 Fair Empl. Prac. Cas. 53 (E.D. Mo. 1978); *EEOC v. Whirlpool Corp.*, 16 Fair Empl. Prac. Cas. 932 (N.D. Ind. 1978); *EEOC v. General Tel. Co.*, 16 Fair Empl. Prac. Cas. 476 (W.D. Wash. 1977); *EEOC v. Pinkerton's Inc.*, 14 Fair Empl. Prac. Cas. 1431 (W.D. Pa. 1977); *EEOC v. CTS*, 13 Fair Empl. Prac. Cas. 852 (W.D. N.C 1976); *EEOC v. Vinnell-Dravo-Lockheed-Manning*, 417 F. Supp. 575 (E.D. Wash. 1976); *Stuart v. Hewlett-Packard Co.*, 66 F.R.D. 73 (E.D. Mich. 1975); and *EEOC v. Lutheran Hosp.*, 10 Fair Empl. Prac. Cas. 1177 (E.D. Mo. 1974).

One commentator concurs that the EEOC should not be required to comply with Rule 23. Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of EEOC v. D. H. Holmes Co.*, 28 Syracuse L. Rev. 741 (1977).

4. Pub. L. 88-352, §§701-716, 78 Stat. 253 (present version at 42 U.S.C. §2000e et. seq.).

5. *Id.* §706(e), 78 Stat. 260.

6. *Id.* §706(e), 78 Stat. 259.

7. *Id.* §706(e), 78 Stat. 260.

8. *Id.* §707(a), 78 Stat. 261.

9. Pub. L. 92-261, 86 Stat. 103, Equal Employment Opportunity Act of 1972 (EEOA).



under §706 based upon individual charges filed with it by aggrieved persons.[10] The 1972 amendments also transferred the Attorney General's pattern or practice authority under §707 to the EEOC.[11]

Upon obtaining the authority to file direct actions in 1972, the EEOC has aggressively initiated §706 actions against private employers, as the case before this Court aptly illustrates. These various private empoyers, as defendants, have raised the question of whether the EEOC should be required to comply with Rule 23.[12]

Since the *Holmes* decision, at least three commentators have reviewed in depth the Congressional history of the 1972 amendments to Title VII.[13] The consensus of opinion, as was recognized by the Fifth Circuit in *Holmes, supra,* 556 F.2d at 794, and *General Telephone, supra,* 599 F.2d at 328 (Pet. App. A-12), is that there is no clear exclusion for the EEOC from Rule 23 in either the legislative history or in the language of Title VII.

During the Congressional debate on the 1972 Title VII amendments, there were two distinct proposals with regard to changing the enforcement powers of the EEOC. One proposal would have given the EEOC enforcement power by permitting it to issue administrative cease-and-desist

10. Section 706(f)(1) of Title VII, 42 U.S.C. §2000e-5(f)(1) (1976). See Pet. App. at A-34 to A-40 for a complete re-print of §706, 42 U.S.C. §2000e-5.

11. Section 707(e) states:

> Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of the person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

EEOC, §5, 42 U.S.C. §2000e-6(e) (1976).

12. See note 3 *supra* and cases cited therein.

13. *Id.*, Bumpass, Comment and Reiter.

orders; the second proposal permitted it to sue directly in federal district court.[14]

The advocates of the court-enforcement approach, which ultimately was accepted, urged that it was necessary to ensure "due process", a "fair trial," and in general a fair hearing for employers, due to the perceived Commission bias in favor of charging parties.[15]

> It stands to reason that the congressmen who expressed such sentiments contemplated the existing judicial "machinery" or "system" which was ultimately adopted by Congress as an enforcement mechanism would include the application of established and customarily applied rules of civil procedure.

Bumpass, *supra* note 3, at 351-52.

During the Senate debate, Senator Dominick proposed the amendment which was finally adopted by the Senate. In its support he argued:

> Additionally, you can do far better in a court proceeding which is impartial, organized, and ruled by precedent and *established rules of procedure* than you can from an administrative proceeding composed of a group of people who are largely responsible to no one except the person who appointed them—largely in the executive department—or who may have been appointed as part of the staff of the agency itself.

EEOA Legislative History, *supra* note 14, at 1557 (emphasis added).

After Senator Dominick's amendment was adopted by the Senate, further comments were made by Senator Ervin, which also assist in ascertaining Congressional intent:

14. See, e.g., Subcomm. on Labor, Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, at 118, 248, 279, 589, 645, 690 (Comm. Print 1972) [hereinafter cited as EEOA Legislative History].

15. *Id.* at 119, 682, 690, 695, 696, 698, 779, 782, 797, 806-810, 837, 838, 991, 992, 1027, 1110, 1270-81, 1290, 1314, 1347, 1418, 1443, 1467, 1533, 1546, 1694.



> As a result of about five separate rollcall votes and many days of debate . . . we adopted the Dominick amendment, which frees Americans involved in controversies with the EEOC from having the EEOC be the prosecutor, the judge, and I might add the executioner. Now they are assured of being able to get a hearing *according to the rules of procedure* and evidence by which the rights of all other persons are judged in courts of our land, and before impartial judges rather than biased crusaders.

*Id.* at 1661 (emphasis added).

The Fifth Circuit in *Holmes*, in concluding that the EEOC was required to comply with Rule 23 (and the other courts which have similarly ruled), attached particular significance to subsequent comments by Senator Javits. *Holmes, supra*, 556 F.2d at 794 n. 11. GTNW contends the Fifth Circuit correctly concluded that Senator Javits' comments clearly expressed the intent that Congress did not mean to exempt §706 actions brought by the EEOC from the application of Rule 23. Senator Javits was arguing as to why the Attorney General's authority to bring §707 pattern or practice suit should be transferred to the EEOC, since it would be permitted to bring class actions under §706 per Rule 23 and therefore should have §707 responsibilities too. He explained:

> One other point which it seems to me is absolutely decisive is that the EEOC, under the Dominick amendment, has the authority to institute exactly the same actions that the Department of Justice does under pattern and practice. These are essentially class actions, and if they can sue for an individual claimant, then they can sue for a group of claimants.
>
> It seems to me that this is provided for by the rules of civil procedure in the Federal courts, and also it is inherent in the amendment which we adopted. Under those circumstances it seems to me that this amendment is conclusively dealt with, and whatever may have been the argument which might have ob-

> tained in respect of cease-and-desist orders and the desire to retain this jurisdiction in the Department of Justice when the Commission was going to proceed by cease-and-desist order rather than suit, has now given way to the fact that the Commission can only proceed by suit. And if it proceeds by suit, then it can proceed by class suit. If it proceeds by class suit, it is in the position of doing exactly what the Department of Justice does in pattern and practice suits.
>
> I have referred to the rules of civil procedure. I now refer specifically to Rule 23 of those rules, which is entitled "Class Actions" and which give the opportunity to engage in the federal court in class actions by properly suing parties. We ourselves have given permission to the EEOC to be a properly suing party.

*Id.* at 589-90; 118 Cong. Rec. 4081-82 (1972).

While the EEOC has argued that the legislative history is scant and ambiguous, one thing which is apparent is that there is *no* specific reference in the legislative history which suggests directly or impliedly that Rule 23 would *not* apply to §706 actions brought by the EEOC. In addition, the Section-by-Section Analysis prepared by Senator Williams did state that "[i]n any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII."[16]

There were no §707 cases prior to March, 1972 where the issue of the applicability of Rule 23 had ever been raised. At that time, however, individual plaintiffs instituting class actions suits under §706 were required to comply with Rule 23. *See, e.g., East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 405, 97 S. Ct. 1891, 1898, 52 L. Ed. 2d 453 (1977); *Oatis v. Crown Zellerbach Co.*, 398 F.2d 496 (5th Cir. 1968). GTNW contends that the Ninth Circuit,

16. EEOA Legislative History, *supra* note 14, at 1844.



in reviewing this legislative history, mistakenly required direct and positive evidence that Rule 23 applied to §706 actions by the EEOC, i.e., the burden was upon GTNW, when the proper analysis should have been to place this burden upon the EEOC to show that the legislative history clearly exempted it. This is reinforced by the analysis of Mr. Bumpass, who notes that Congress added a subsection to §706 in 1972 which specifically amended Rule 53 of the Federal Rules of Civil Procedure with regard to the appointment of a special master to handle Title VII actions.[17]

> This congressional action is of great significance to the rule 23 issue because it demonstrates that Congress contemplated that the Federal Rules would apply to EEOC actions, as well as to other civil rights actions. Moreover, Congress deemed it necessary to qualify the application of the provisions of one of the rules to title VII actions. It can only be concluded that had Congress intended that rule 23 not apply to Commission suits, it would have taken similar action with respect to rule 23.[18]
>
> ° ° ° °
>
> It is reasonable to presume that Congress was aware, at the time the 1972 amendments were drafted, of the general applicability of the Federal Rules of Civil Procedures to all civil actions. . . .
>
> Finally, as was pointed out earlier with respect to the application of rule 53 to Commission actions and as was noted by the court in *Holmes*, Congress certainly knows how to establish exemptions from the Federal Rules. It did not do so with respect to the application of rule 23 to section 706 actions brought by the Commission. It is, therefore, reasonable to conclude, for this reason as well as the others discussed previously, that Congress intended that rule 23 would apply to such actions.[19]

17. Bumpass, *supra* note 3, at 360-62.

18. *Id.* at 362.

19. *Id.* at 364, 366.

In concluding this section, GTNW contends that a review of the legislative history of the 1972 amendments to Title VII confirms the following: the court enforcement procedure by the EEOC was adopted to ensure procedural fairness to employers, under the established rules of civil procedure; the comments by the respective Congressmen suggest that they believed Rule 23 would apply to EEOC actions under §706; Congress was aware of the general applicability of the federal rules to all civil actions, and knew how to make specific exceptions, which it did for Rule 53. Therefore, it must be concluded that Congress intended that actions by the EEOC under §706 would be governed by Rule 23 when brought on behalf of a class.

**4. The Applicability and Desirability of Applying Rule 23 to EEOC Actions**

The EEOC has argued in this case, and in most of the others, that it cannot comply with the requirements of Rule 23. In reviewing Rule 23, the Ninth Circuit concluded that a class did exist. *General Telephone, supra,* 599 F.2d at 327 (Pet. App. A-10). The Ninth Circuit then recognized that Title VII gave the EEOC "standing to sue" and stated that the "legislative history makes it clear that the EEOC is a 'properly suing party'." *Id.* at 327-28 (Pet. App. A-11). But then the Ninth Circuit decided that the purpose of an EEOC suit was "to vindicate public interest," *id.* at 328 (Pet. App. A-12), and therefore the EEOC could not satisfy the requirement of Rule 23(a)(3).[20] GTNW contends the Ninth Circuit erred in this regard.

"[T]he Government vindicates some congressional policy whenever it sues." *Holmes, supra,* 556 F.2d at 792 n.7. That same public policy, however, is vindicated by §706

20. Rule 23 is set forth in Pet. App. at A-41 to A-43.



suits commenced by private litigants, *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974). In fact, this Court has recognized the public interest in Title VII actions by private plaintiffs, characterizing them as "acting as 'private attorneys general'", and awarding them attorneys' fees accordingly when successful. *Albemarle Paper Company v. Moody,* 422 U.S. 405, 415, 95 S. Ct. 2362, 2370, 45 L. Ed. 2d 280 (1975). *See also Christianburg Garment Co. v. EEOC,* 434 U.S. 412, 417, 98 S. Ct. 694, 698, 54 L. Ed. 2d 648, 654 (1978). Moreover, §706 actions by private litigants must comply with Rule 23. *East Texas Motor Freight System Inc. v. Rodriguez, supra.* Since a §706 suit, whether brought by the government or by private litigants, inevitably vindicates the public interest, it is difficult to ascertain an adequate rationale for using the "public interest vs. private interest" distinction as a basis for exempting the EEOC from compliance with Rule 23 while requiring the compliance of private litigants. *Holmes, supra,* 556 F.2d at 792 n. 7. This is particularly true where the EEOC suit clearly seeks the same relief the individual claimants would request if they were suing on their own.

The Court has addressed this particular issue in the analysis employed by Mr. Justice Rehnquist, joined by Chief Justice Burger, in the dissent in *Occidental Life Ins. Co. of Cal. v. EEOC,* 432 U.S. 355, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977). In the dissenters' opinion, EEOC suits brought under §706 were actions primarily designed to redress injuries suffered by individual claimants. To the extent that a Congressional policy was vindicated by such suits, the dissenters observed that the public interest was always vindicated by government suits. If the EEOC had not

sued on behalf of the individual claimants, they would have been entitled under §706 to initiate legal proceedings on their own. Thus, according to the dissent, the EEOC placed itself in the shoes of the individual claimants and, having chosen that stance from which to commence the litigation, the EEOC should be required to comply with the same procedural rules that the individual claimants must follow if they had sued on their own. *Id.*, 432 U.S. at 381, 97 S. Ct. at 2462, 53 L. Ed. at 421.

Although the majority of this Court in *Occidental Life* did not address the dissent's characterization of the role of the EEOC in §706 suits, neither did the majority dispute the dissent's analysis. GTNW contends that the analysis by the dissent in *Occidental Life* regarding compliance by the EEOC with the same procedural rules as private litigants should be adopted by this Court.

It is not uncommon for parties who are not technically class members to be permitted to serve as Rule 23 representatives. For example, Rule 23 class actions have been brought by associations,[21] unions[22], and others[23]. In a recent decision by the Ninth Circuit, it held (reversing the district court) that a union could bring a Rule 23 action under Title VII, explaining:

> It is now clear that unions may maintain actions

21. *Arkansas Educ. Assn. v. Board of Educ.*, 446 F.2d 763 (8th Cir. 1971); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Smith v. Board of Education*, 365 F.2d 770 (8th Cir. 1966); *Thompson v. Board of Educ.*, 71 F.R.D. 398 (W.D. Mich. 1976). *See also Hunt v. Washington State Apple Advertising Comm.*, 423 U.S. 333, 97 S. Ct. 2434, 53 L.Ed. 2d 383 (1977).

22. *Social Services Union v. County*, .. F.2d .., 21 Fair Empl. Prac. Cas. 684 (9th Cir. 1979); *Int'l Woodworkers v. Georgia-Pacific Corp.*, 568 F.2d 64, 67 (8th Cir. 1977). GTNW does not concur with these decisions, permitting the unions to proceed §706, but the incongruity in the Ninth Circuit applying Rule 23 to unions and not the EEOC is obvious.

23. See generally the discussion and authorities in Comment, 46 U. Chi. L. Rev. 690, *supra* note 3, at 712.



> under Title VII on behalf of their members. Indeed, "policy considerations weigh strongly in favor of affording standing to unions which file suit to end discriminatory employment practices. The financial backing and legal expertise that unions can provide would materially advance the type of private enforcement essential to the effectiveness of Title VII."

*Social Services Union v. County, supra* note 22, 21 Fair Empl. Prac. Cas. at 685.

Prior to 1972 the EEOC could not bring actions on its own, but it now can do so and with its expertise, resources and stature it has increased the effectiveness of Title VII actions, similar to the reasons set forth above as to why unions should be permitted to sue under Title VII for their members. But it becomes a complete anomaly in the law if, to use our facts as an example, the four charging parties would have to comply with Rule 23 if they filed a §706 class action based upon their charges, and their union would have to comply, but the EEOC, seeking identical relief and unable to file the action without the four charges, does not have to comply with Rule 23. The legislative history supports the conclusion that Congress intended the EEOC to be governed by Rule 23.

Since Congress gave the EEOC standing to sue, it is a real party in interest ("a properly suing party", said Senator Javits) and thus for the purposes of Rule 23 it should be considered a member of the class under 23(a).[24] The position of the Ninth Circuit in this regard is unclear. It recognized that the EEOC was a properly suing party, and then it stated "that the EEOC is an adequate representative of victims of employment discrimination," 599 F.2d at 328

24. *Holmes, supra*, 556 F.2d at 796-97; *EEOC v. Page Eng'r. Co., supra* note 3, 17 Fair Empl. Prac. Cas. at 1640.

(Pet. App. A-12), and that the "Rule 23(a) certification requirement has been satisfied [by the EEOC]" 599 F.2d at 333 (Pet. App. A-21). But the Ninth Circuit then suggested that rather than requiring the EEOC to comply with Rule 23, the court could exercise its broad equitable powers under §706(g) of Title VII, 599 F.2d at 334 (Pet. App. A-23), a conclusion which seemed inconsistent with its earlier statements. By so concluding the Ninth Circuit disregarded the reasons why Rule 23 was adopted initially, as will be discussed later.

The EEOC argued below that it cannot comply with the literal membership language of Rule 23(a), although the Ninth Circuit concluded otherwise, and contended there may be such conflicts between its position and that of the prospective classmembers that it could not meet the requirements of Rule 23(a)(4). This latter argument was circular in form as no specific conflicts were identified, and the conclusion was presumed just because the statement was made. But such conflicts, if they arise, may be no greater in degree than those between the named plaintiffs in a private action and the other class members. Furthermore, any conflicts are more theoretical than actual because both in private actions and in EEOC suits under §706 there is a request for back pay. Whether this request is because of the desire for restitution (aggrieved parties) or because of deterrence (EEOC), the effect is the same.

> The interests of the representative and the members of the class need not be identical; they need only share common objectives and legal or factual positions. Moreover, the interests of the representative may go beyond those of the class without being in conflict with those of the class.
>
> The main consideration in determining the adequacy of representation under rule 23(a)(4) is the forthrightness and vigor with which the representative of the class can be expected to defend the interests of the members of the class. While the EEOC may be concerned with protecting the public interest when it brings a section 706 action seeking back pay for aggrieved individuals, that motive does not prevent it from representing aggrieved individuals with the requisite forthrightness and vigor.



Bumpass, *supra* note 3, at 375.

The EEOC also argued it could not satisfy Rule 23(a)(1) as to numerosity. This is a flexible requirement, but GTNW suggests the EEOC should be required to comply with it and it can do so. At some point it must establish the size of the class on whose behalf it is seeking relief. *See Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977). If it is not sufficiently numerous to justify a class action, or if the EEOC cannot otherwise satisfy Rule 23, the EEOC should be permitted to represent only those individuals who have filed the charges on which the action is based, without joinder, in accordance with Rule 17(a).[25]

The EEOC has further contended it cannot satisfy Rule 23(a)(3) as to typicality, suggesting it might be restricted to asserting claims similar to those of the parties upon whose charges the action is based. [26] In the court below, it relied upon those cases from the Ninth Circuit discussing the "public policy" vindicated by the EEOC. *EEOC v.*

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25. Fed. R. Civ. P. 17(a) provides that "a party authorized by statute may sue in his own name without joining him for whose benefit the action is brought . . . ." See also the discussion in Bumpass, *supra* note 3, at 377-80, although GTNW is not in total agreement with the author's recommendation in this regard.

26. Petition for Certiorari at 14, *EEOC v. D. H. Holmes Co.*, 436 U.S. 962 (1978) (*cert. denied*).

*Occidental Life Ins. Co. of Cal.*, 535 F.2d 533, 542 (9th Cir. 1976), and *EEOC v. Hearst Corp.*, 553 F.2d 579, 580 (9th Cir. 1976). Those cases, however, referred to "public policy" as a basis for expanding the scope of the *standing* of the EEOC to bring suit for all discriminatory practices discovered during a reasonable investigation. Assuming, *arguendo*, the appropriateness of this position, the EEOC still should be required to comply with Rule 23(a)(3), and the claims should be typical of those of the charging parties *and* others for whom the EEOC has standing to bring suit, i.e., other types of claims discovered during a reasonable investigation.[27] The EEOC should not, however, be permitted to bring broad-based class action suits beyond those typical of the charging parties or those discovered during the investigation, and then seek to buttress these claims by the ensuing discovery during the actual lawsuit.[28]

### 5. The Problems In Failing to Require That Rule 23 Apply to EEOC Actions Under §706

While GTNW believes the above history and argument adequately sets forth reasons why this Court should conclude that Rule 23 applies to actions by the EEOC, there are many policy reasons in this regard too.

It has been held among the lower courts that neither a settlement nor a decision in an EEOC action is binding

27. See Bumpass, *supra* note 3, at 380-82.

28. In our experience the EEOC has greatly contributed to its own backlog of cases by trying to make a "federal case" out of many individual charges. Typically a charging party's complaint will be re-written by the EEOC investigator to allege class-wide discrimination, although that may not coincide with the actual desires of the charging party. The result is that the employer will refuse to conciliate on a class-wide basis, delaying matters considerably, when the individual charge could have been quickly resolved.



upon the individual employees, even if they were members of the class on whose behalf the EEOC sued.[29] The result could be the subsequent litigation of the same facts and issues in different forums with different results, which is an absolute waste of the resources of both litigants and the courts. [30] As the Fifth Circuit stated in *Holmes*:

> It scarcely needs to be added that Fed. R. Civ. P. 23 also furthers several other important interests. It helps prevent piecemeal suits, saving time and expense. It permits wide scale relief, often encouraging people with small claims to come forward. At the same time, it affords the defendant a measure of protection against inconsistent adjudications and it es-

29. *Roman v. ESB Inc.*, 550 F.2d 1343 (4th Cir. 1976); *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 845 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 65, (5th Cir. 1974), *rev'd on other grounds*, 431 U.S. 395, 97 S. Ct. 1891, 52 L.Ed.2d 453 (1977); *Williamson v. Bethlehem Steel Corporation*, 468 F.2d 1201 (2d Cir. 1972), *cert. denied*, 411 U.S. 913 (1973); and *EEOC v. Delaware Trust Co., supra* note 3. The decision is binding, however, upon the aggrieved individuals upon whose charges the EEOC initiated the suit.

30. *EEOC v. Datapoint Corp.*, 570 F.2d 1264 (5th Cir. 1978). *See also Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 715 (7th Cir. 1969), *EEOC v. Delaware Trust, supra* note 3, and Fed. R. Civ. P., Adv. Comm. Notes, 39 F.R.D. 69, 91 (1966). This is not just a theoretical possibility in the present case either as the four charging parties are in Beaverton, Oregon and similar charges have been filed with the Oregon Bureau of Labor, Civil Rights Division, and it is suggesting it will soon bring a similar class action, which will duplicate many of the legal and factual issues herein. In addition, numerous lawsuits have arisen as a result of the American Telephone and Telegraph consent decree with the EEOC. *EEOC v. AT&T*, Civ. No. 73-149 (E.D. Pa., filed Jan. 18, 1973), *reprinted in* EQUAL EMPLOYMENT OPPORTUNITY AND THE AT&T CASE (P. Wallace ed. 1976). The union intervened in the action and appealed the adverse effects upon its union agreements, albeit unsuccessfully, but this still caused the litigation to drag on for several more years. *EEOC v. AT&T*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978). Many others also contested the consent decree. *See, e.g., Walker v. Southwestern Bell Tel. Co.*, 18 Fair Empl. Prac. Cas. 1784 (N.D. Tex. 1978); *Garnett v. Mountain States Tel. & Tel. Co.*, 18 Fair Empl. Prac. Cas. 1773 (D. Colo. 1978); *Peals v. Southwestern Bell Tel. Co.*, 18 Fair Empl. Prac. Cas. 1781 (D. Kan. 1977); *Butera v. Mountain States Tel. & Tel. Co.*, 18 Fair Empl. Prac. Cas. 1779 (D. Colo. 1977); *LaCombe v. Mountain States Tel. & Tel. Co.*, 18 Fair Empl. Prac. Cas. 1774 (D. Colo. 1977).

> tablished a degree of judicial control to check possible abuse of the class device. All of these interests remain compelling regardless of the identity of the plaintiff. We certainly do not see why EEOC, in particular, presents a special case. If EEOC is exempted from Rule 23, chaos in the management of Title VII class actions could result. Such matters as notice, exclusion, intervention, dismissal or compromise, and statute of limitations treatment would be put in question.

556 F.2d at 795-96.

As the *Holmes* court noted, certification of classes under Rule 23 will provide clear definition to the action, adequately notify defendants of adverse interests and will make discovery more effective and pretrial identification of the issues more feasible. At the present time in this action the charges were filed by four women working at the Beaverton, Oregon facility (R. 24, 27). This is one facility out of 116, one state out of five, and four employees out of over 5000 (R. 114-27). In the normal situation, had the action been brought by the four individual charging parties, GTNW could have obtained definition of the class and would have known the appropriate limits for which discovery would be required, such as either that facility or the facilities in that division, or maybe even the facilities in that state. As it stands, however, the EEOC maintains it can have discovery for the entire company—all facilities, all states, and all employees. Objections as to improper discovery are difficult because there is no class definition or limits of any type on the action.[31] In the usual case classes are defined and limits imposed. Many employers have over 100,000 employees. A multi-state employer with several large facilities, under such an action by EEOC, would have

31. For a discussion of the problems of permitting broad, undefined discovery (such as the EEOC seeks in these undefined class actions), see authorities cited in *Carter Carburetor v. EEOC*, .. U.S. .., 99 S. Ct. 865, 868-69, 59 L.Ed.2d 52 (1979) (Mr. Justice Powell, dissenting from denial of certiorari).



an unbelievably burdensome task in seeking to comply with discovery without an adequate class definition, as GTNW is experiencing at the present.

There were many well-advanced reasons for the adoption of Rule 23 initially. The 1966 Committee Note to Rule 23 indicates that the rule was specifically intended to apply to situations such as those in the present case,[32] and in particular this applies to civil rights cases.[33]

The *Proposed Amendments to Rules of Civil Procedure for the United States District Courts, supra* note 32, regarding the amendment which eventually became the present Rule 23, stated:

> Illustrative [of the kind of actions which would fall under proposed Rule 23(b)(2)] are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.

GTNW contends that since it was obvious when the drafters prepared Rule 23(b)(2) that it was expressly enacted to cover civil rights suits, it only follows that Congress would have specifically mentioned that Rule 23 did not apply to civil rights suits commenced by the EEOC, at the time of the 1972 amendments, if it had so intended. Lack of such expression confirms that Congress did not intend to exempt the EEOC from Rule 23.

There are many benefits which Rule 23 would provide to EEOC actions. The *res judicata* effect of a decision, and

32. *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 69, 100-01 (1966). *See also* 3B Moore's Federal Practice ¶23.02 [1], at 23-25 (2d ed. 1979).

33. 3B Moore's Federal Practice, *supra* note 32, ¶23.02 [2.-6], at 23-50 to 23-53. *See also Pearson v. Townsend*, 326 F. Supp. 202, 211 (D. S.C. 1973).

the elimination of the risk of multiple lawsuits, is of paramount importance and is essential to ensure procedural fairness for the defendant employer. If the employer is going to be bound to the class if he loses, it is only fair that the class be bound by the decision if the employer prevails.[34] It is no more unfair to hold class members bound by an EEOC suit than it is to have them bound by a suit of the same scope but brought by private individuals.

Another important benefit of Rule 23 is that it binds class members to a settlement, as well as to an adjudication, and assists in eliminating subsequent lawsuits.[35] It also permits better judicial control of the proceedings in general and settlement, particularly through its Rule 23(d) powers. (See Pet. App. A-43.)

Possible prejudice exists as to potential class members too by the failure to require the EEOC to comply with Rule 23. The EEOC frequently develops and changes the scope and benefits of its lawsuit, as it desires, throughout the course of its action when there is no early determination of a class.[36] Potential class members may rely upon the

34. See *EEOC v. Datapoint, EEOC v. Delaware Trust* and *EEOC v. Page Eng'r, supra* note 3.

35. *See* notes 29 & 30 *supra* for a list of cases involving subsequent suits after class litigation without the benefits of Rule 23. *See also* Zimmer & Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 Duke L.J. 163, 207 n. 136. The only aggrieved individuals bound in a §706 suit are those upon whose charges the EEOC based the action, and literally hundreds of charges may be pending against large employers, although only four (as here) may be used as the basis for the suit. During fiscal year 1974 the EEOC said at least 3184 charges were pending against five nation-wide employers—an average of 636 each. COMPTROLLER GENERAL, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION (1976).

36. See discussion of EEOC procedures in *EEOC v. Delaware Trust Co., supra* note 3.



EEOC action only to discover it fails to provide the relief they desire, and they cannot bring their own class actions but they are limited to the back pay relief obtained by the EEOC,[37] or at least they have waited so long that their relief is limited by §706(e).

The above discussion more than adequately demonstrates than Rule 23 can, and should, be applied to EEOC suits under §706.

The Ninth Circuit did recognize that problems would be encountered because of a failure to comply with Rule 23, but sought to parry them by suggesting that the courts rely upon their equitable powers under §706(g) of Title VII. *General Telephone, supra,* 599 F.2d at 344-35 (Pet. App. A-24). GTNW contends that this return to the pre-1966 amendments to the federal rules completely overlooks the reasons behind the enactment of Rule 23.[38] The Ninth Circuit also misconstrued the purpose of §706(g)—it is to assist in ensuring that aggrieved individuals achieve their "rightful place" (substantive relief) in situations where a simple award of damages would be inadequate; its purpose is not to permit circumvention of the Federal Rules of Civil Procedure.

The Court's decision in *Franks v. Bowman*, 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 444 (1976), discussed equitable relief under §706(g). Mr. Justice Brennan noted that its purpose was to grant broad equitable discretion to "make whole" the individual claimants, i.e., assist them to achieve their rightful place when damages would be inadequate because there existed a "continuing effect" of past discrimi-

37. *See, e.g., Stuart v. Hewlett-Packard Co.*, 66 F.R.D. 73 (E.D. Mich. 1975); *Franklin v. General Electric Co.*, 15 Fair Empl. Prac. Cas. 1085 (W.D. Va. 1975); and the AT&T cases cited in note 30 *supra*.

38. See notes 32 & 33 *supra*.

nation. 424 U.S. at 763-64, 96 S. Ct. at 1264. There was no suggestion that the purpose of §706(g) was to develop alternatives to Rule 23. A similar interpretation was acknowledged by Justice Stewart in *Teamsters v. United States, supra,* 431 U.S. at 364, 97 S. Ct. at 1869. If flexibility is needed in handling the class, Rule 23 itself is more than adequate.

### 6. The Relationship Between §707 and §706

The Ninth Circuit, relying somewhat upon the magistrate's report and recommendation, concluded that there was no difference between §707, pattern or practice actions, and §706 after the 1972 amendments. 599 F.2d at 333 (Pet. App. A-21). There are, however, differences in the sections both in the statute and as treated by the EEOC itself. At the present time the EEOC uses §707 to eliminate broad systematic discrimination, as opposed to individual claims under §706. The Chair of the EEOC, Eleanor Norton Holmes, appeared before the House Committee on Employment Opportunities on July 27, 1977 to outline her plan for a total redesign of the Commission and its functions. Point No. 5 concerned establishing a new program to deal with systemic discrimination. A new "Systemic Division" was subsequently created to deal with patterns and practices of discrimination for major employers. On March 29, 1978 the EEOC announced the criteria which the Systemic Division would use in selecting companies for major pattern and practice cases.[39]

In the petition for certiorari filed with this Court by the EEOC in the *Holmes* case, the Commission continued to

39. CCH Employment Practices Guide ¶5062.



maintain that a distinction existed between §706 and §707.[40]

Regardless of whether §707 and §706 are similar, or identical, or dissimilar, the fact remains that prior to 1972 the issue had never been raised as to whether Rule 23 applied to §707 actions.[41] Moreover, before 1972 §707 actions did differ from §706 actions. Some commentators have argued, however, that Rule 23 should be applied to §707 for the same reasons it should be applied to §706; it will serve the same purposes and will impose no more in the way of restrictions other than are necessary to ensure fairness for all the parties, to include employers.[42] Conceivably, however, differences may continue to exist between §707 and §706: a Commissioner's charge may prompt a §707 suit, but not a §706 suit; a class action may be appropriate under §706 because it concerns a sufficiently large number of employees at one facility, out of many, for

40. *EEOC v. D. H. Holmes,* Petition for Cert, *supra* note 26, at 19, which stated:

> The Commission has traditionally used Section 706 as the appropriate enforcement device in cases in which charging parties have filed complaints with the Commission. Section 707 is reserved for more serious cases involving systemic discrimination and initiated by a Commissioner's charge. See EEOC Guidelines, BNA Daily Labor Report, March 22, 1978, p. A-6.

41. The first circuit case to even hold that back pay was an available remedy under §707 was *United States v. Georgia Power Co.,* 474 F.2d 906 (5th Cir. 1973), a decision rendered *after* the 1972 amendments to Title VII. Since it most frequently is the question of back pay which prompts the inquiry as to the *res judicata* effect of such a judgment, it becomes more understandable why the Rule 23 issue as to §707 was never raised prior to 1972. Before 1972 the Attorney General had primarily sought injunctive relief under §707, without back pay. *See Developments in the Law—Title VII,* 84 Harv. L. Rev. 1109, 1243 (1971).

42. See generally the discussion in Bumpass, *supra* note 3, at 390-94, and Comment, 46 U. Chi. L. Rev., *supra* note 3, at 693-96. Note also, however, that in the §707 action in *Teamsters v. United States, supra,* the district court did create classes and sub-classes in a procedure similar to that required by Rule 23.

a large employer, but there is no pattern or practice as the standard operating procedure (systemic discrimination) throughout the company which will justify a §707 action; and the EEOC may use §707 primarily for broad-ranging prospective relief or injunctive relief (as it primarily did before 1972) without seeking back pay and related benefits for individual employees, as it would be required to do under §706, and therefore avoiding the necessity of complying with Rule 23. Whether this Court reaches these issues or not, it remains apparent that Rule 23 should be held to apply to §706 actions by the EEOC.

## CONCLUSION

The Federal Rules of Civil Procedure are to apply to all civil actions, unless otherwise exempted. There is no specific exemption for Rule 23 either in the rules or by statute. A close scrutiny of the legislative history fails to support the conclusion that Congress intended to exempt actions by the EEOC from Rule 23, and implied repeals, particularly with the dearth of support therefor, are to be rejected.

There are many advantages to applying Rule 23 to actions brought by the EEOC, the same as there are advantages in applying it to other actions filed by individual claimants. These include *res judicata* effect upon class-members, certainty and predictability, more effective discovery, identification of adverse interests, better judicial control, and fairness to all the parties, including the employers. There is an elimination of multiple litigation with Rule 23.

For all of the above reasons GTNW urges this Court to



hold that Rule 23 applies to §706 actions brought by the EEOC.

Dated this 24th day of January, 1980.

Respectfully submitted,

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FOR ARGUMENT

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No. 79-488

# In the Supreme Court of the United States

OCTOBER TERM, 1979

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., ET AL., PETITIONERS

*v.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT

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# In the Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-488

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., ET AL., PETITIONERS

*v.*

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENT

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-24) is reported at 599 F.2d 322. The report and recommendation of the magistrate (Pet. App. A-25 to A-32), which was approved and adopted by the district court (Pet. App. A-33), is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on June 27, 1979. The petition for a writ of certiorari was filed on September 22, 1979, and was granted on December 10, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission has authority under Section 706(f)(1) of Title VII of the Civil Rights Act of 1964 to seek relief from discriminatory practices affecting a class of individuals without being certified as class representative under Rule 23 of the Federal Rules of Civil Procedure.

## STATUTE INVOLVED

Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5, is reproduced in the Appendix to the petition (Pet. App. A-34 to A-40).

## STATEMENT

The Equal Employment Opportunity Commission brought this suit under Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1), against General Telephone Company of the Northwest, Inc., its subsidiary, West Coast Telephone Company, Inc., and Local Union No. 89, International Brotherhood of Electrical Workers. The complaint, as amended, alleges that General Telephone and West Coast Telephone discriminate against female employees with respect to their maternity leave policies and assignments to craft jobs and managerial positions (A. 9, 10). The complaint further alleges that the defendant Union participated in those unlawful practices in its representation of General Telephone employees (A. 10). The Commission seeks injunctive relief, as well as back pay for individuals affected by these practices (A. 11).



The allegations in the complaint are based on information obtained by the Commission in the investigation of charges of discrimination filed by four individuals against General Telephone and the union (see Pet. App. A-7). As a result of these investigations, the Commission found reasonable cause to believe that General Telephone was discriminating against female employees in the manner alleged in the complaint (Pet. App. A-7 n.1). After efforts at conciliation proved unsucessful, the Commission instituted this lawsuit.

The district court referred the case to a magistrate for trial (A. 22). On the same date, the Commission moved for an order bifurcating the issue of liability from the issue of individual damages and backpay (A. 12). General Telephone thereafter filed a motion asking the court to dismiss the "class action aspects" of the complaint on the ground that the Commission had not moved for certification as a "class representative" pursuant to Fed. R. Civ. P. 23 within the time limit set by local Rule 23 of the Western District of Washington (A. 24). The magistrate recommended that General Telephone's motion be denied, and the district court adopted the magistrate's recommendation (Pet. App. A-25 to A-32, A-33).

An interlocutory appeal from this ruling was certified pursuant to 28 U.S.C. 1292(b). The court of appeals affirmed the judgment of the district court, holding that the Commission could obtain relief under Section 706 of Title VII for a class of individuals harmed by discrimination without being certified as

a class representative under Rule 23 of the Federal Rules of Civil Procedure (Pet. App. A-1 to A-24). The court of appeals concluded that neither Rule 23 nor Title VII requires class certification of Commission enforcement actions and that, for such lawsuits, the class certification process would be time consuming and costly and would serve no useful purpose (Pet. App. A-12 to A-23).

## SUMMARY OF ARGUMENT

The question presented in this case is not, as petitioners argue, whether the Federal Rules of Civil Procedure apply to a "class action" brought by the EEOC under Title VII of the Civil Rights Act of 1964. Rather, the questior in this case is whether an enforcement action under Section 706(f)(1) of the Act filed by the Commission in its own name and pursuant to its authority "to prevent any person from engaging in any unlawful employment practice" (42 U.S.C. 2000e-5(a)) is a "class action" subject to the requirements of Rule 23.

The traditional and correct answer to this question is that a public agency, such as the Commission, that is empowered to bring litigation to enforce federal law is not acting as—and need not be certified as—a "class representative." This is because, even though the government may seek relief that will directly benefit a discrete group of private citizens, suits by the United States and its agencies are brought on behalf of the public to promote the public interest in enforcing the requirements of federal laws. The



legislative history of the 1972 amendments to Title VII, in particular, reflects that Congress authorized the Commission to bring suit under Section 706(f)(1) in order to promote "the overriding public interest in equal employment opportunity * * * through direct Federal enforcement." 118 Cong. Rec. 4941 (1972). Accordingly, courts of appeals have specifically rejected the contention that, in exercising its discretionary enforcement authority under Title VII, the Commission serves merely as a proxy for individual complainants.

As is the case with suits brought by the United States and its agencies to enforce other federal statutes, it is the statute, rather than Rule 23, that authorizes the government to sue in its own behalf and seek comprehensive relief for persons affected by violations of federal law. 42 U.S.C. 2000e-5(f)(1), (g). Furthermore, because absent plaintiffs are not bound by the judgment entered in the Commission's enforcement actions, the procedural protections afforded these parties under Rule 23 are inapposite in the government's litigation.

It is significant, moreover, that the government enforcement suits authorized under Section 706(f)(1) do not fit within the terms of Rule 23 as they are commonly understood. It is, for example, difficult to suggest meaningful criteria under which the Commission would satisfy the threshold requirement of Rule 23 that it be a member of the class that it purportedly represents in enforcement actions under Title VII. Similarly, because the Commission's enforcement responsibilities should be exercised in the

public interest and therefore may not entirely coincide with the interests of particular employee classes, the Commission should not be required to establish that its claims are "typical of the claims * * * of the class" and that it would "adequately protect the interests of the class" within the meaning of Rule 23 (a)(3), (4). To the extent that government actions under Section 706 would fail to satisfy the prerequisites of Rule 23, application of the Rule to limit the scope of EEOC enforcement litigation would frustrate Congress's intent that the Commission serve as the primary enforcement agent under the Act and that comprehensive relief be available in government enforcement actions.

Petitioners argue that Rule 23 should be applied to government enforcement actions under Section 706 in order to provide an early, clear definition to the action and to protect defendants from duplicative litigation and conflicting decrees. But Rule 23 is not a substitute for discovery; if a defendant wishes to determine in more detail the precise contours of the Commission's claims, the discovery procedures of the Federal Rules provide the appropriate means for obtaining that information. And the possibility that separate private and government actions may be brought under Section 706 exists precisely because Congress provided for both public and private remedies under Title VII. Moreover, as the court of appeals emphasized in this case, the risk of duplicative or conflicting litigation can be minimized by the exercise of the district court's equitable powers under Section 706(g).



## ARGUMENT

### ENFORCEMENT ACTIONS BROUGHT BY THE GOVERNMENT UNDER SECTION 706(f)(1) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 ARE NOT "CLASS ACTIONS" SUBJECT TO THE REQUIREMENTS OF RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Petitioners argue that when the EEOC files an enforcement action under Section 706(f)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(1), the Commission "is bound by the Federal Rules of Civil Procedure as is any other litigant" (Br. 6). Petitioners therefore claim that, if the Commission seeks to bring a "class action" under Section 706(f)(1), the class certification requirements of Rule 23 must first be satisfied.[1] Although these propositions are essentially unobjectionable, they do not answer the question that this case presents.

The question here is *not* whether the Federal Rules of Civil Procedure apply to a "class action" brought by the Commission under Title VII; rather, the question in this case is whether an enforcement action under Section 706 that is brought by the Commission in its own name (A. 2, 7) and pursuant to its authority "to prevent any person from engaging in any unlawful employment practice" (42 U.S.C. 2000e-5(a)) is a "class action" subject to the requirements of Rule 23. We will show that the traditional and correct answer to this question is that a government enforcement action is not a "class ac-

[1] These requirements are discussed at pages 20-25, *infra*.

tion" under Rule 23 even when (as here) the action seeks relief that will directly benefit a discrete group of affected private citizens. We will further show that this result is consistent with the language and history of Title VII and does not frustrate the objectives that Rule 23 is designed to accomplish.

### A. Enforcement Actions Brought By The EEOC Under Section 706(f)(1) Are Not Class Actions Even Though Relief May Be Sought For A Discrete Group Of Affected Private Citizens

#### 1. *In initiating litigation under Section 706, the Commission acts to promote the public interest in equal employment opportunity and not merely to advance the private interests of affected citizens*

Prior to 1972, the Commission's responsibilities under Title VII had been limited by Congress to the investigation and conciliation of private complaints. In 1972, however, in order to provide "the Commission with effective power to enforce title VII" (S. Rep. No. 92-415, 92d Cong., 1st Sess. 28 (1971)),[2]

[2] The initial Senate Report on the 1972 amendments noted that the "failure to grant the EEOC meaningful enforcement powers has proven to be a major flaw in the operation of title VII." S. Rep. No. 92-415, *supra*, at 4. The Senate version of the amendments proposed that the Commission be given administrative authority to issue cease and desist orders in adjudicative proceedings. *Id.* at 1. The bill ultimately adopted in Conference and enacted by Congress provides for court enforcement in suits filed either by private plaintiffs or the Commission or the Attorney General under Section 706. The purpose of the legislation remained that of enhancing federal enforcement capability. See 118 Cong. Rec. 7167 (1972).



Congress amended Section 706 of the Civil Rights Act of 1964 to authorize the Commission "to prevent any person from engaging in any unlawful employment practice [in violation of that title]." 42 U.S.C. 2000e-5(a). In particular, Congress added Section 706(f)(1) to Title VII to enable the Commission to bring suit in its own name in federal district court against private employers alleged to have violated the Act. 42 U.S.C. 2000e-5(f)(1). At the same time, Congress granted a parallel authority to the Attorney General to bring suit on behalf of the United States in cases involving employment discrimination by state and local governments, agencies and political subdivisions. *Ibid.* Senator Williams, the sponsor and floor manager of the Senate bill, stated that these amendments were designed to permit the Commission and the Attorney General to achieve "the overriding public interest in equal employment opportunity * * * through direct Federal enforcement." 118 Cong. Rec. 4941 (1972).

An action may be filed by the Commission under Section 706 only after the Commission has received a charge from either a private individual or a Commissioner alleging that an employer is engaged in unlawful employment discrimination. 42 U.S.C. 2000e-5(f)(1). After the charge is received, the Commission must determine whether there is reasonable cause to believe the charge is true and, if there is, attempt to eliminate the discrimination (if any) uncovered during the Commission's investigation by conciliation. If the discrimination cannot be elimi-

nated by these informal means, the Commission then determines whether to initiate a civil action in federal court.[3]

In bringing litigation pursuant to Section 706, the Commission (or the Attorney General) acts to advance "the overriding public interest in equal employment opportunity * * *." 118 Cong. Rec. 4941 (1972). Courts are broadly empowered by Section 706(g) to grant equitable relief (such as hiring or reinstatement or restitution in the form of backpay) in favor of employees affected by any unlawful employment practices that are proven as part of the Commission's suit. It is well recognized, however, that the Commission's role is primarily to vindicate the public interest and not simply to advance the private rights of the victims of discrimination. See, *e.g.*, *EEOC* v. *General Electric Co.*, 532 F.2d 359,

[3] The statute provides that the Commission "may" initiate litigation in these circumstances. 42 U.S.C. 2000e-5(f)(1). The Commission thus retains discretion to not file an action when, although reasonable cause may exist to believe that a violation has occurred, litigation is deemed not likely to advance the enforcement objectives of the statute. Congress contemplated that direct federal enforcement, rather than actions brought by private litigants, would become the primary enforcement mechanism for Title VII following the 1972 amendments (118 Cong. Rec. 7168 (1972) (Section-By-Section Analysis of Senators Williams and Javits); Congress also, however, retained the right of private litigants to bring actions under Section 706, so "that an individual aggrieved by a violation of Title VII should not be forced to abandon the claim merely because of a decision by the Commission or the Attorney General as the case may be, that there are insufficient grounds for the Government to file a complaint." 118 Cong. Rec. 7168 (1972).



373 (4th Cir. 1976); *EEOC* v. *E.I. duPont de Nemours and Co.*, 516 F.2d 1297, 1299 (3d Cir. 1975); *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1359 (6th Cir.), cert. denied, 423 U.S. 994 (1975).[4] Indeed, the courts of appeals have specifically repudiated the suggestion that, in exercising the litigating responsibility conferred on it in 1972, the Commission serves merely as a proxy for individual complainants under Section 706.[5] For example,[6]

[4] See also *Blue Bell Boots, Inc.* v. *EEOC*, 418 F.2d 355, 358 (6th Cir. 1969) ("[T]he Commission may, in the public interest, provide relief which goes beyond the limited interests of the charging parties.")

[5] The fact that a charge by either a Commissioner or a private citizen must precede the filing of a complaint does not distinguish the role of the Commission under Title VII from that of other federal agencies in the enforcement of other federal statutes. The charge-initiated proceedings under Title VII are analogous to proceedings under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621, *et seq.*, and the Occupational Safety and Health Act of 1970, 20 U.S.C. 651, *et seq.*, and were patterned after the National Labor Relations Act, 29 U.S.C. 151, *et seq.* See *Graniteville Co.* v. *EEOC*, 438 F.2d 32, 39 (4th Cir. 1971). In *NLRB* v. *Fant Milling Co.*, 360 U.S. 301 (1959), this Court concluded that the NLRB's authority under that Act is not limited to enforcing the claims of named charging parties (*id.* at 307-308):

> To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. * * * The Board was created not to adjudicate private controversies but to advance the public interest * * *."

See also *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 367-369 (1940).

[6] See also *EEOC* v. *The Bailey Co.*, 563 F.2d 439, 454 (6th Cir. 1977), cert. denied, 435 U.S. 915 (1978); *Johnson* v.

in *EEOC* v. *General Electric Co., supra,* 532 F.2d at 373, the court stated:

> [T]he standing of the EEOC to sue under Title VII cannot be controlled or determined by the standing of the charging party to sue, limited as he is in rights to the vindication of his own individual rights. To hold otherwise * * * would be to continue treating the sole purpose of the Title to be the correction of individual wrongs rather than of public or "societal" wrongs as well as to deny to the EEOC the right to be any more than a mere proxy for the charging party rather than what Congress by the Amendments of 1972 intended, i.e., the public avenger by civil suit of any discrimination uncovered in a valid investigation and subjected to conciliation under the Act.

Because the Commission does not simply stand in the shoes of private complainants in bringing litigation under Section 706, the Commission is not limited in

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*Nekoosa-Edwards Paper Co.*, 558 F.2d 841, 846-847 (8th Cir.), cert. denied, 434 U.S. 920 (1977); *EEOC* v. *Occidental Life Insurance Co.*, 535 F.2d 533, 542 (9th Cir. 1976) ("the EEOC is charged with the vindication of public policy, not merely with the enforcement of private rights"), aff'd, 432 U.S. 355 (1977).

In its decision affirming the judgment of the court of appeals in *EEOC* v. *Occidental Life Insurance Co., supra,* this Court recognized a distinction between government-initiated and private-initiated litigation under Title VII, noting that the Commission may challenge practices not challenged in any private charge by giving "[p]rompt notice of a reasonable-cause determination also serves to cure any deficiencies in the 10-day notice that may result from EEOC amendment of the claimed violation [uncovered] after investigation." 432 U.S. at 372-373 n.32.



a Section 706 suit to the issues raised by the charging party, but may include all forms of discrimination discovered in its investigation of the charge and subjected to its conciliation efforts. *Johnson* v. *Nekoosa-Edwards Paper Co.*, 558 F.2d 841, 846-847 (8th Cir.), cert. denied, 434 U.S. 920 (1977); *EEOC* v. *Hearst Corp.*, 553 F.2d 579, 580 (9th Cir. 1977); *EEOC* v. *General Electric Co., supra,* 532 F.2d at 366; *EEOC* v. *McLean Trucking Co.*, 525 F.2d 1007, 1010 (6th Cir. 1975). Indeed, the Commission may bring a Section 706 suit even though the charging party is no longer entitled to relief if, in the investigation of the charge, the Commission finds reasonable cause to believe that the employer is engaged in unlawful employment practices. See, *e.g.*, *Kimberly-Clark Corp., supra,* 511 F.2d at 1361; *EEOC* v. *Huttig Sash & Door Co.*, 511 F.2d 453, 455 (5th Cir. 1975); *EEOC* v. *Louisville & Nashville R.R.*, 505 F.2d 610, 617 (5th Cir. 1974).

***2. A public agency that Congress has authorized to bring litigation to enforce federal law need not be certified as a "class representative" of the affected members of the public***

A public agency, such as the Commission, that is empowered by Congress to bring litigation to enforce federal law need not be certified as a "class representative" of the members of the public directly affected by the claimed unlawful conduct. Outside the context of Title VII, no court has ever held that a suit by the United States or any of its agencies to enforce federal law must proceed as a class action on

behalf of the affected public.[7] This is so even where the public litigation will—under either common law or statute—operate as a basis for collateral estoppel in subsequent suits brought by private plaintiffs.[8] And this is so even where, as here, the United States or its agencies seek equitable relief, including restitution, for private citizens as part of the remedy in the government action.

For example, in *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), the Administrator of the Office

[7] The Fifth Circuit concluded in *EEOC* v. *D. H. Holmes Co.*, 556 F.2d 787 (1977), cert. denied, 436 U.S. 962 (1978), that the EEOC must be certified as a class representative to obtain relief for persons other than the named charging party in a suit under Section 706. The *Holmes* decision was premised on the court's view that the EEOC's role under Section 706 was merely that of promoting the grievances of individual private employers. 556 F.2d at 794. That conclusion was incorrect for reasons discussed above. The *Holmes* decision has, however, spawned much controversy in the district courts, which have differed sharply on the question that this case presents. These decisions are collected in Comment, *Certification of EEOC Class Suits Under Rule 23*, 46 U. Chi. L. Rev. 690, 691 nn.14, 15 (1979), and in Petitioners' Brief at 9 n.3.

[8] 15 U.S.C. 16(a) provides that any judgment obtained by the United States in contested public criminal or civil litigation under the antitrust laws shall be prima facie evidence of that violation in subsequent private treble damage actions. No court has suggested that the United States must be certified as a class representative in its suits to enforce the antitrust laws. And this is so even though, unlike under 42 U.S.C. 2000e-5(f)(1), private plaintiffs have no right to intervene in the government's antitrust enforcement action. Compare *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 688-690 (1961), with Pet. App. A-24. See Comment, *supra*, 46 U. Chi. L. Rev. at 693 n.30.



of Price Administration brought suit in federal district court under Section 205(a) of the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 33, to restrain a landlord from collecting rents in excess of the then-applicable federal rent ceiling.[9] The Administrator also sought a decree requiring the landlord "to tender to such persons as are entitled thereto a refund of all amounts collected by defendant from tenants as rent * * * in excess of the [federal rent ceiling] * * *."[10] 328 U.S. at 396-397. This Court held "that a decree compelling one to disgorge profits, rents or property acquired in violation of the Emergency Price Control Act" was one properly within the jurisdiction of the district court "as an equitable adjunct to an injunction decree" in the Administrator's suit. *Id.* at 398-399. Even though an aggrieved tenant was authorized "to sue for damages in his own

[9] Section 205(a) provided (56 Stat. 33; see 328 U.S. at 397):

> Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

[10] The Administrator excepted from his request for relief the claims of any tenant who previously had commenced a direct private action against the landlord for the return of excessive rents under Section 205(e) of the Act. 328 U.S. at 397.

behalf" under Section 205(e) of the Act (328 U.S. at 401; see note 10, *supra*), the Court held that restitution of excessive rents to private tenants in the Administrator's suit was authorized under Section 205(a) as an equitable order "necessary to vindicate the public interest, [and] to compel compliance with the Act * * *." 328 U.S. at 402.

The situation here closely parallels that in *Porter* v. *Warner Holding Co.* When the EEOC or the Attorney General exercises their discretion to bring suit under Section 706(f)(1),[11] they do so to promote "the overriding public interest in equal employment opportunity * * * through direct Federal enforcement." 118 Cong. Rec. 4941 (1972). And, as under the Emergency Price Control Act in *Porter*, if a violation is established in the government's suit, the court may exercise its ample equitable power under the Civil Rights Acts to remedy the harm caused by each unlawful practice. See 328 U.S. at 398. Thus, Section 706(g) specifies that, once a violation is found, "the court may enjoin the respondent * * * and order such affirmative action as may be appropriate, which may include * * * reinstatement or hiring of employees, with or without backpay * * * or any other equitable relief as the court deems appropriate." *Ibid.* As under the Emergency Price Control Act in *Porter*, and under the National Labor Relations Act in *NLRB* v. *Rutter-Rex Manufacturing Co.*, 396 U.S. 258 (1969), an equitable award of reparation or

[11] See note 3, *supra*.



backpay to private citizens affected by the illegality is an "order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of [unlawful conduct]." *Id.* at 263.[12] Moreover, it has been recognized in the present case (Pet. App. A-24), as it was in *Porter* (328 U.S. at 403), that the district courts possess inherent equitable power in appropriate cases to notify private parties who may benefit from a reparation or backpay order and to condition any award of relief on the waiver of their independent personal right of action. See also page 35, *infra*.

Petitioners note (Br. 16-17), however, that representative actions by private parties under Section 706 must proceed as class actions under Rule 23. They argue that actions filed by the Commission (and,

[12] Indeed, this Court has specifically recognized that the availability of backpay as a remedy for violations of the Act established in the Commission's suit is an equitable adjunct of the Commission's request for relief that serves primarily a public function as a calatyst for compliance with the Act (cf. *Porter* v. *Warner Holding Co., supra*, 328 U.S. at 402). As this Court explained in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975):

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 379 (CA8 1973).

presumably, the Attorney General) seeking equitable relief for affected employees under Section 706 therefore also must proceed as class actions. But this contention is no more apt under Title VII than it would be in other contexts involving government enforcement litigation that affects the interests of private parties.[13] The private class action is a procedural device that authorizes individuals who have been personally affected by an alleged illegality to serve as the litigation representative of others similarly situated. See, *e.g.*, 3B *Moore's Federal Practice* ¶ 23.02 [1], at 23-35 to 23-44 (1979). Suits brought by the United States and its agencies to enforce federal statutes—including Title VII—stand on a completely different footing. Under Section 706(f)(1), for example, the Commission and the Attorney General have standing not because they have suffered any particularized harm from any conduct but because Congress has granted them authority to enforce this law. The Commission and the Attorney General do not depend

[13] Government actions to prevent statutory or constitutional violations often directly benefit private individuals. Sometimes individuals benefit from injunctive relief (*e.g.*, 42 U.S.C. 1971); often they receive restitution for losses suffered as a result of the violations of law. See the Fair Labor Standards Act of 1938, 29 U.S.C. 217; the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621-634; the Equal Pay Act of 1963, 29 U.S.C. 206(d). Under such statutes, when the government obtains monetary relief for individuals, it does so not as a mere proxy for those individuals, but under its authority to enforce the law. Such broad-scale relief is available in government actions in large part because of its importance in deterring violations and securing compliance with federal law. See *Wirtz* v. *Jones*, 340 F.2d 901, 904 (5th Cir. 1965).



on Rule 23 as a source of authority to sue to remedy widespread illegality; rather, Section 706(f)(1) itself authorizes the government's enforcement suit and Section 706(g) authorizes district courts to grant equitable relief, including backpay, for employees affected by any violations established in the government's litigation. Thus, under Section 706(f)(1), as under the Emergency Price Control Act in *Porter*, it is the statute, rather than Rule 23, that empowers the government to sue in its own behalf and seek broad relief for persons affected by proven violation of federal law. See, *e.g.*, *EEOC* v. *Raymond Metal Products Co.*, 17 Fair Empl. Prac. Cas. 206, 207 (D. Md. 1978); *EEOC* v. *Schlueter Mfg. Co.*, 17 Fair Empl. Prac. Cas. 53, 54 (E.D. Mo. 1978); *EEOC* v. *Pinkerton's, Inc.*, 14 Fair Empl. Prac. Cas. 1431, 1433 (W.D. Pa. 1977).

The historical objectives that the class certification procedure is designed to achieve further indicate that Rule 23 is inapplicable to government enforcement actions under Section 706(f)(1). Under prior practice as well as under the current Rule, a private litigant seeking to proceed on behalf of a class has been required to demonstrate that his "personal interest is sufficiently parallel to the interests of other class members to assure a vigorous representation of the class." *Donaldson* v. *Pillsbury Co.*, 554 F.2d 825, 831 (8th Cir.), cert. denied, 434 U.S. 856 (1977). The purpose of this requirement has been to ensure that absent class members—who ordinarily have no choice as to whether to be represented in a private class

suit seeking equitable relief and who will thus be bound without their consent by the result [14]— are not denied due process of law. See *Hansberry* v. *Lee*, 311 U.S. 32 (1940); 3B *Moore's Federal Practice*, *supra*, ¶ 23.07[1], at 23-199. As petitioners recognize (Br. 26 n.35), however, absent employees are not bound by the judgment entered in government enforcement actions under Section 706(f)(1). Cf. *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 845 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976); *Williamson* v. *Bethlehem Steel Corp.*, 468 F.2d 1201, 1203-1204 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973). The procedural protections afforded to absent plaintiffs under Rule 23 are therefore inapposite in the government's enforcement litigation.[15]

It is significant, moreover, that the government enforcement suits authorized under Section 706(f)(1) simply do not fit the terms of Rule 23 as they are

[14] Private class actions under Title VII almost without exception seek injunctive relief as at least part of the requested relief and are therefore certified under Rule 23(b)(2). Formal notice to class members and an opportunity to opt out of the class action under Rule 23(c)(2) is therefore not required in private Title VII litigation, even though claims for backpay or other restitutionary relief are also included. *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir.) (notice under Rule 23(c)(2) not required in combined 23(b)(2) and 23(b)(3) class action), cert. denied, 421 U.S. 972 (1975). See Comment, *supra*, 46 U. Chi. L. Rev. at 714 n.139.

[15] The effect of enforcement litigation under Section 706(f)(1) on the defendant's interest in avoiding duplicative litigation and conflicting judgments is discussed at pages 34-36, *infra*.



commonly understood. In the first place, it is not meaningful to think of the Commission (or the United States in suits brought by the Attorney General) as a member of the class that it purportedly represents in actions under Section 706(f)(1). If Rule 23 were applicable to government enforcement litigation, this would, of course, be a threshold requirement.[16] See 3B *Moore's Federal Practice*, *supra*, ¶ 23.04[2], at 23-120 to 23-128.

Petitioners argue (Br. 19-20) that, because Congress intended the Commission to be "a properly suing party" under Section 706 (118 Cong. Rec. 4082 (1972) (Senator Javits)), the Commission should be considered to be a member of the class of affected employees for purposes of Rule 23(a). But, although Congress has given the Commission standing as "a properly suing party" to bring an enforcement action in its own name under Section 706, it does not follow that Congress has made the Commission a member of any employee class. Nor, as petitioners contend (Br. 18-19), does the fact that unions and private associations may, in some circumstances, sue

[16] Fed. R. Civ. P. 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

as a class representative for their members [17] demonstrate that the EEOC is a class representative in government enforcement litigation. Private membership organizations may represent their members in class actions because the organizations are subject to membership control and supervision and, indeed, ordinarily are chartered to represent the collective interests of their membership as their alter ego.[18] Indeed, they have no other interest in the litigation—unlike the EEOC or the United States which bring suit under Section 706 to vindicate the public interest, and neither of which is composed of, or subject to the control or supervision of, the affected employees who constitute the putative class. Accordingly, the United States and the Commission do not share the characteristics of private associations as alter egos of their members that permit meaningful application of the criteria of Rule 23.[19] See *EEOC* v. *Whirlpool Corp.*, 80 F.R.D. 10, 14 (N.D. Ind. 1978); *EEOC* v. *Akron National Bank & Trust Co.*, 78 F.R.D. 684, 687 (N.D. Ohio 1978).

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[17] See cases collected in Comment, *supra*, 46 U. Chi. L. Rev. at 711-712 nn.119-124.

[18] When private associations contain conflicting membership interests they may lose their ability to serve as class representative for the entire membership. See *Air Line Stewards and Stewardesses Association* v. *American Airlines, Inc.*, 490 F.2d 636, 642 & n.5 (7th Cir. 1973).

[19] In *East Texas Motor Freight* v. *Rodriguez*, 431 U.S. 395, 403 (1977), the Court stated that a class representative must "'possess the same interest and suffer the same injury' as the class members."



Nor do the Commission's enforcement responsibilities suggest that it should be required to establish that its claims are "typical of the claims * * * of the class" and that it would "adequately protect the interests of the class" within the meaning of Rule 23(a)(3), (4). See note 16, *supra*; *EEOC* v. *Akron National Bank*, *supra*.[20] Because government enforcement actions under Section 706(f)(1) seek to remove the effects of all unlawful discriminatory practices discovered in its investigation of private or Commissioner charges (see page 13, *supra*), the government's claims for relief may not coincide entirely with those of any employee class. In particular, as the court of appeals noted in *McClain* v. *Wagner Electric Corp.*, 550 F.2d 1115 (8th Cir. 1977), the Commission's request for relief may emphasize prospective affirmative action while the class of current employees may desire retroactive relief in the form of backpay (*id.* at 1121-1122):

> [T]he interests of [the EEOC] in filing, prosecuting or settling a § 706 case are not necessarily identical with the interests of individual employees who have been the victims of invidious discrimination in employment. In achieving the broad social and economic objectives of the Act, the Commission may be more concerned with future compliance with the Act by employers than with redressing employee grievances that

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[20] Petitioners also acknowledge (Br. 21) that the numerosity requirement of Rule 23 (see 3B *Moore's Federal Practice*, *supra*, ¶ 23.05[1]) could impede the Commission's ability to obtain relief for small groups of aggrieved individuals.

> have accrued already. And on the other hand, individual employees may well be more interested in being compensated for the wrongs that they may have suffered individually than in future compliance with the Act on the part of employers.

Congress recognized this potential conflict between private interests and the Commission's responsibility to achieve the "overriding public interest in equal employment opportunity" (118 Cong. Rec. 4941 (1972)) by providing that an aggrieved person may intervene as of right in the Commission's enforcement action. 42 U.S.C. 2000e-5(f)(1). If Congress had regarded the Commission as the alter ego, and necessarily adequate representative, of private employee classes, this provision would have been unnecessary.[21]

To the extent that government actions under Section 706 would fail to satisfy the prerequisites of Rule 23, application of the Rule to limit the scope of EEOC enforcement litigation would frustrate Congress's intent that the Commission serve as the pri-

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[21] Cf. *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972), where this Court held that an aggrieved individual could intervene in a government enforcement action under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 482(b), because of the possibility that the government might not adequately represent the individual's interest. 404 U.S. at 538-539. It is unnecessary in the present case to consider the extent to which a prospective intervenor's right to participate in a suit by the Commission may be circumscribed by his failure to file a timely charge with the Commission.



mary enforcement agent under the Act and that broad-based equitable relief be available in federal enforcement actions under Section 706(g).[22] If this Court were to conclude that Rule 23 is applicable to government enforcement actions under Section 706(f)(1), the Commission would, of course, attempt to overcome the several analytical barriers to its status as class representative. Otherwise, Congress's intent that the Commission, rather than private litigants, serve as the primary enforcement agent for Title VII would be thwarted. But we submit that the proper course for achieving Congress's clear intent is not to strain or redefine the generally-applicable terms of Rule 23. Instead, the Court should apply to Commission actions under Section 706(f)(1) the traditional rule that an agency litigating in its own name to enforce a federal statute is not suing as a "class representative" even though—in order to "do complete rather than truncated justice" (*Porter* v. *Warner Holding Co.*, *supra*, 328 U.S. at 398)—the federal courts are empowered to grant relief on behalf of a discrete group of the affected public in government enforcement actions.

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[22] In adopting the 1972 amendments to Title VII, Congress intended that "direct Federal enforcement" (118 Cong. Rec. 4941 (1972)), rather than private litigation, would serve as the primary means of achieving compliance. See note 3, *supra*. If the EEOC were disabled from seeking relief under Section 706(g) for all employees affected by an unlawful practice, the congressional scheme would be seriously compromised.

### 3. *The legislative history of the 1972 amendments to Title VII does not indicate that Congress intended Rule 23 to apply to Commission enforcement litigation*

Nothing in the legislative history suggests that Congress intended Commission enforcement actions under Section 706(f)(1) to be subject to the requirements of Rule 23. Petitioners argue (Br. 13-15) that, because the legislative history does not explicitly demonstrate an intention to "exempt" government enforcement actions from Rule 23, this Court should infer that Congress intended Rule 23 to apply. But, in view of the traditional rule that government enforcement actions are not representative suits, there is no reason why Congress would have thought that the Commission *needed* an exemption from Rule 23 to enable it to sue in its own name to enforce Title VII. Accordingly, legislative silence on this issue would, if anything, support the conclusion that Congress did not intend government enforcement actions under Section 706(f)(1)—any more than government enforcement actions under other statutes—to be subject to Rule 23.[23]

The history of Title VII demonstrates that Congress intended to retain the basic distinction between

[23] Similarly, petitioners err in relying (Br. 12-13) on statements by Senators who supported court enforcement of Title VII because court actions would be subject to "established rules of procedure" (118 Cong. Rec. 3810 (1972) (Sen. Dominick); see *id.* at 4607 (Senator Ervin)), for the rule established by lengthy practice is that government enforcement actions are not representative actions of the type that are subject to Rule 23.



suits by the government, suing in its own right to enforce federal law, and suits by private individuals to obtain relief from unlawful practices. When Title VII was first considered by the House of Representatives in 1964, the House bill provided that enforcement of Title VII would be located in a quasi-judicial administrative agency patterned after the National Labor Relations Board. H.R. 7152, 88th Cong., 1st Sess. (1963). Congress rejected this proposed administrative enforcement scheme, however, and placed enforcement of Title VII in the courts. The bill that Congress enacted established the EEOC as a public investigatory agency with conciliation responsibility and authorized individuals to bring private actions in federal district court. The Attorney General, either on his own or on the recommendation of the EEOC, was empowered under Section 707 of the Act to bring suit if he was satisfied that a "pattern or practice" of discrimination existed. 42 U.S.C. 2000e-6(a). The Attorney General also was authorized to intervene in any private Title VII action brought under Section 706.

Between 1964 and 1972, the United States filed 69 pattern or practice suits under Section 707 of the Act. 118 Cong. Rec. 4078 (1972). In none of the decisions in these cases did any court conclude, or even suggest, that the Attorney General was suing simply as a class "representative" of the persons who were likely to benefit from the litigation. To the contrary, the courts recognized that suits brought by the United States for enforcement purposes were distinct from class actions by private litigants and that judg-

ments in government enforcement actions would not bind private citizens who were not made parties to the action. *E.g.*, *Williamson* v. *Bethlehem Steel Corp.*, 468 F.2d 1201 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973). And this was so even though, in a number of cases decided prior to 1972, courts had awarded specific relief (such as preferential hiring order and constructive seniority) in pattern-or-practice suits to specific individuals. See, *e.g.*, *United States* v. *Chesapeake & Ohio Ry.*, 471 F.2d 582 (4th Cir. 1972), cert. denied, 411 U.S. 939 (1973); *United States* v. *St. Louis-San Francisco Ry.*, 464 F.2d 301 (8th Cir. 1972), cert. denied, 409 U.S. 1107, 1116 (1973); and *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971).[24] No court suggested before the Act was amended in 1972 that the availability of private relief in the government action converted the enforcement suits into "class actions." Any such contention would seem to have been plainly defective in view of this Court's decision in *Porter* v. *Warner Holding Co.*, *supra*. See pages 14-16, *supra*.

When Congress considered alternative means of improving enforcement of Title VII in 1972, it was presumably aware of this history. The purpose of the 1972 amendments was to improve enforcement

[24] In decisions announced since 1972, courts have held that the government may seek awards of backpay for individual employees as proper relief in pattern-or-practice suits under Section 707. See *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 314-315 (6th Cir. 1975); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973).



by greatly expanding the government's enforcement role. S. Conf. Rep. No. 92-681, 92d Cong. 2d Sess. 16-17 (1972); 118 Cong. Rec. 4941 (1972). In enacting the amendments, however, Congress again rejected proposals that would have made the EEOC a quasi-adjudicative body empowered to issue cease and desist orders in administrative hearings. Instead, while retaining a private right of action in defined circumstances under Section 706, the amendments authorized the EEOC (with respect to private employers) and the Attorney General (with respect to government employers) to bring government enforcement actions under Title VII and to intervene in any independent private action. 42 U.S.C. 2000e-5(f)(1), 2000e-6. The Commission was authorized to initiate litigation not only in pattern and practice suits under Section 707 but also with respect to all other complaints of discriminatory employment action under Section 706.[25] *Ibid.*

[25] The bill reported out of the Senate committee authorized the EEOC to receive, investigate and conciliate charges against both public and private employers. It also would have authorized the Commission to adjudicate charges against private employers, but not against government employers. If conciliation of any charges against public employers was unsuccessful, the charges were to be referred to the Attorney General for enforcement by civil action. See Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 1st Sess. 381-382 (1971). The Senate Report states that this distinction was adopted to avoid "the needless friction that might be created by a Federal executive agency issuing orders to sovereign states and their localities." S. Rep. No. 92-415, *supra* at 25. At no time was it suggested that the Attorney General would be limited in bringing suits against

The debates on these amendments indicate that, in altering and expanding the government's enforcement role under Title VII, Congress did not intend to limit the government to the status of a "class representative" subject to Rule 23.[26] Rather, Senators Javits and Williams stated that the EEOC's authority to initiate litigation under Section 706(f)(1) would allow it to bring "exactly the same actions that the Department of Justice does under pattern and practice" (118 Cong. Rec. 4081 (1972)), and that "[t]here will be no difference between the cases that the Attorney General can bring under section 707 as a 'pattern and practice' charge and those which the Commission will be able to bring as a result of [the] decision to give EEOC court enforcement

public employers to the role of a "class representative" bound by the restrictions of Rule 23.

When the Senate bill was amended to withhold administrative adjudicative authority from the EEOC, the Senate gave the Commission the same prosecutorial power with regard to private employers that it had previously determined to give the Attorney General with respect to public employers. In referring to the difference between the enforcement schemes in the original bill, and the bill adopted, Senator Dominick indicated that the amendment would result in similar treatment of claims by all employees. 118 Cong. Rec. 943 (1972).

[26] Statements in the legislative history indicating that the 1972 amendments were not intended to change "the present use of class action lawsuits under Title VII in conjunction with Rule 23" (118 Cong. Rec. 4081-4082 (1972)) meant only that the amendments were not to alter the prevailing use of class actions under Section 706 by private litigants. Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of EEOC* v. *D. H. Holmes Co.*, 28 Syracuse L. Rev. 741, 758 (1977).



powers [under Section 706]" (118 Cong. Rec. 4081 (1972)). As petitioners point out (Br. 14), Senator Javits elaborated by stating that (118 Cong. Rec. 4081-4082 (1972)):

> [If the Commission] proceeds by suit [under Section 706(f)(1)], then it can proceed by class suit. If it proceeds by class suit, it is in the position of doing exactly what the Department of Justice does in pattern and practice suits.
>
> * * * * *
>
> I have referred to the rules of civil procedure. I now refer specifically to rule 23 of those rules, which is entitled "Class Actions" and which give the opportunity to engage in the Federal courts in class actions by properly suing parties. We ourselves have given permission to the EEOC to be a properly suing party.

In context, it is clear that these remarks were made simply to demonstrate that, because a Commission suit under Section 706 may be just as broad as a pattern and practice suit under Section 707, "the pattern and practice section becomes a redundancy in the law." 118 Cong. Rec. 4081 (1972) (Senator Williams). Senator Javits did not state that the EEOC must be certified as a class representative when it brings an enforcement action seeking broad relief under Section 706; nor did he indicate that he had given specific attention to that question.[27] Rather, he stressed that the government en-

[27] See Comment, *supra*, 46 Chi. L. Rev. at 698. Although this Comment concludes that the legislative history is ambiguous (*ibid.*), it notes that Senator Javits might have "meant that Congress had made the EEOC a properly suing party in class suits without regard to rule 23." *Ibid.*

forcement authority created under Section 706 and Section 707 was essentially the same and should therefore be placed in a single agency. Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of EEOC* v. *D. H. Holmes Co.*, 28 Syracuse L. Rev. 741, 753 n.72 (1977).

The legislative history thus contemplates that enforcement actions brought by the Commission under Section 706 would not differ in nature from government enforcement actions under Section 707 or under any other analogous law. When the Commission brings suit under Section 706 to enforce the "overriding public interest in equal employment opportunity" (118 Cong. Rec. 4941 (1972)), it thus should not, under traditional principles, be subject to the representational requirements of a class action under Rule 23.

**B. District Courts Possess Ample Power Under Section 706(g) To Ensure Procedural Fairness To All Persons Concerned In The Commission's Litigation**

Petitioners claim (Br. 22-28) that Rule 23 should be applied to government enforcement actions under Section 706 in order to achieve essentially two purposes: to provide an early, clear definition to the action and to protect defendants from duplicative litigation and potentially conflicting decrees.[28] The

[28] Petitioners also suggest (Br. 26-27) that class certification would protect employees as well. But, as is discussed in more detail at page 20, *supra*, may intervene in the Commission's action and if they do not choose to do so they are not bound by the judgment in that action (although in some circumstances Title VII's time limitations for filing a charge with the Commission may, as a practical matter, eliminate their alternatives).



court of appeals correctly rejected petitioners' proposed rationale for extending Rule 23 to government enforcement litigation (Pet. App. A-21 to A-24).[29]

The argument that Rule 23 is necessary to define the scope of the government's suit plainly lacks merit. Rule 23 is not a substitute for discovery. If a defendant wishes to determine in more detail the precise contours of the Commission's claim, the discovery procedures of the Federal Rules provide ample, appropriate means for obtaining that information. As in all other civil litigation, responses made during discovery will often be provisional; discovery is intended to shape litigation, not prevent it. But class definition and certification under Rule 23 also is provisional. The definition of a class may be modified at any time before the case is decided on the merits. Fed. R. Civ. P. 23(c)(1). District courts have sufficient means under the discovery rules to ensure that the Commission's claims in an enforcement action are developed in a fair and timely manner.

The principal policy reason advanced by petitioners for extending the certification requirement of Rule 23 to Commission enforcement actions is that it would

[29] Petitioners' proposed reasoning does not distinguish the Commission's Title VII litigation from any other government enforcement action. Their arguments, though incorrect for the reasons discussed in the text, would have been equally applicable in *Porter* v. *Warner Holding Co.* or in other cases involving government litigation affecting the interests of non-party citizens.

avoid duplicative or inconsistent adjudication for defendants. But the possibility that separate private and government actions may be brought under Section 706 exists precisely because Congress provided for both public and private remedies under Title VII. Cf. *Porter* v. *Warner Holding Co.*, *supra*, 328 U.S. at 401-403. It is because of the separate private and public enforcement procedures that courts have held that a private plaintiff other than the charging party named in the complaint (if any) is not bound by the decree in a government enforcement action under Title VII. *Doninger* v. *Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1307 (9th Cir. 1977); *McClain* v. *Wagner Electric Corp.*, *supra*, 550 F.2d at 1122; *United States* v. *Allegheny-Ludlum Industries, Inc.*, *supra*, 517 F.2d at 836-837, 840; *Williamson* v. *Bethlehem Steel Corp.*, *supra*, 468 F.2d at 1203.[30] As this Court pointed out with particular reference to Title VII in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination."

While we agree with petitioner that there is no necessary bar to subsequent suits by individuals after government enforcement actions are completed, as a practical matter such suits are highly unlikely. Moreover, the risk of duplicative litigation can be minimized by the exercise of the district court's equitable powers under Section 706(g).

[30] Thus, in the 1972 amendments to Title VII, although Congress was aware of the provisions of the Equal Pay Act of 1963, 29 U.S.C. 206(d) and the Fair Labor Standards Act of 1938, 29 U.S.C. 216(c), under which litigation by the United States expressly precludes further private litigation, Congress did not adopt similar provisions in Title VII.



In the first place, if the government prevails in its litigation, the district court may include a provision in its decree to condition the receipt of backpay by any individual on the waiver of an his or her personal right of action. *Doninger* v. *Pacific Northwest Bell, Inc.*, *supra*, 564 F.2d at 1309; *United States* v. *Trucking Employers, Inc.*, 561 F.2d 313, 318 (D.C. Cir. 1977); *United States* v. *Allegheny-Ludlum Industries, Inc.*, *supra*, 517 F.2d at 853-862. Because all relief under Title VII is equitable in nature (42 U.S.C. 2000e-5(g)), double recovery for any employee should not be permitted in the court's decree in any subsequent litigation.

If, on the other hand, the employer obtains a favorable judgment in the Commission's action, the *stare decisis* effect of such a decision can be expected to deter any duplicative private litigation. See *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 758-760 (3d Cir.) (en banc), cert. denied, 419 U.S. 885 (1974); *Atlantis Development Corp.* v. *United States*, 379 F.2d 818, 828 (5th Cir. 1967).

The danger of conflicting or duplicative litigation under Title VII is thus substantially less than petitioner asserts. As the court of appeals concluded in this case, "courts may fashion appropriate orders to insure that defendants are not subjected to double payment or unnecessarily duplicative litigation. Under their broad equitable powers the courts may

prescribe procedures and remedies which are fair and equitable to all parties" (Pet. App. A-24). Cf. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 60 n. 21.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1980

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-488

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., ET AL.,
*Petitioners,*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

and

LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## MEMORANDUM FOR RESPONDENT LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

---

## MEMORANDUM FOR RESPONDENT LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

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### I. ROLE OF RESPONDENT LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS IN THE LITIGATION

The purpose of this memorandum is to advise the Court of the role Local Union No. 89, International

Brotherhood of Electrical Workers (Local 89) has taken in the course of this litigation. Unfortunately, the decisions of the courts below do not distinguish among the three defendants named in the complaint and thus the record before this Court does not adequately represent the true course of the litigation with respect to Local 89.[1]

Only the Petitioners, General Telephone Company of the Northwest, Inc. and West Coast Telephone Company of California, Inc., (jointly hereinafter GTNW) filed the motion to dismiss the class action aspects of the case in the District Court. Similarly, only GTNW appealed the decision of the District Court approving the Magistrate's Report to the Court of Appeals for the Ninth Circuit. Finally, only GTNW, not Local 89, filed the petition for a writ of certiorari with this Court. At no time has Local 89 participated in any way in the briefs or arguments relating to the question whether the EEOC must seek certification as a class representative under Rule 23 of the Federal Rules of Civil Procedure.

A major reason for Local 89's posture in the courts below is the fact that discussions between the EEOC and Local 89 were in progress with respect to resolving the allegation in the complaint against Local 89. On December 18, 1978, the Court approved a consent decree between EEOC and Local 89, a copy of which is contained in the appendix to this memorandum. The consent decree releases Local 89 from all claims stated in EEOC's first and second amended complaints.[2] The decree states

[1] The Ninth Circuit in its decision defined the "defendants-appellants" as: "General Telephone Company of the Northwest, Inc., its subsidiary, West Coast Telephone Company of California, Inc., and Local Union No. 89, International Brotherhood of Electrical Workers (collectively called General Telephone)" despite the fact that Local 89 did not participate in the appeal. (Pet. App. A-7).

[2] A cross claim filed by GTNW is still pending against Local 89. GTNW seeks judgment against Local 89 in the event a final judgment is entered against GTNW in favor of the EEOC or any of the persons it purportedly represents.



that it: "does not constitute an adjudication or finding that there has been a violation of Title VII and should not be construed as an admission by Local 89 of any past discriminatory practice." (Local 89 App. at 2a.) The decree provides that Local 89 will cooperate in placing women in craft jobs, supply EEOC with information regarding grievances filed by employees of GTNW and abide by any court decree or judgment issued in the underlying litigation against the companies. The failure of the courts below to distinguish Local 89 from the other defendants fails to take cognizance of Local 89's position in the litigation and of the consent decree to which it voluntarily agreed. Nevertheless, because the class action issue is before this Court for determination on the merits, Local 89 wishes to comment briefly on that issue.

## II. THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION SHOULD BE REQUIRED TO CONFORM WITH RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE WHEN IT BRINGS SUIT UNDER SECTION 706(f)(1) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 SEEKING RELIEF FROM DISCRIMINATORY PRACTICES AFFECTING A CLASS OF INDIVIDUALS

On the merits of the issue before the Court, Local 89 contends that the EEOC should be compelled to meet the requirements of Rule 23 when it sues on behalf of a class of individuals under Section 706 of Title VII of the Civil Rights Act of 1964. Local 89 supports the rationale for applying Rule 23 set forth in the Fifth Circuit's opinion in *EEOC* v. *D. H. Holmes Company*, 556 F.2d 787 (5th Cir. 1977), *cert. denied*, 438 U.S. 265 (1978), and the numerous district court decisions set forth in the petition which have applied Rule 23 to Section 706 actions. (Petition, p. 5, note 1.) These cases all point out the basic unfairness to Title VII defendants if the EEOC is not required to conform to Rule 23. Rule

23 certification would provide Title VII defendants with adequate notice and protection from *multiple litigation* of the same facts and issues with potentially inconsistent adjudications. At the same time, members of the class, who would be bound by the final judgment, would derive the benefits of EEOC representation without the burdens and expense of litigation. They would also obtain a clear knowledge of their rights and remedies vis-a-vis the defendants under that judgment and the Statute. EEOC, too, would benefit from an early and clear demarcation of the scope of its action in prosecuting its claims through discovery and trial. Finally, applying Rule 23 to the EEOC would allow for a more efficient marshalling of judicial time and effort. On balance, the small burden placed upon EEOC in seeking certification of a class action under Rule 23 does not outweigh the necessary protections afforded Title VII litigants and potential class members in actions brought by the EEOC.

Respectfully submitted,

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January, 1980

# APPENDIX

## APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Civil Action Number C-77-247M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Plaintiff*,

v.

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC.,

and

LOCAL UNION NO. 89, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

and

WEST COAST TELEPHONE COMPANY OF CALIFORNIA, INC.,
*Defendants.*

### CONSENT DECREE BETWEEN PLAINTIFF AND DEFENDANT LOCAL 89, IBEW

The Equal Employment Opportunity Commission, plaintiff, initiated this suit on April 11, 1977, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended by Public Law 92-261, 86 Stat. 103 (March 24, 1972). By agreement of plaintiff and Local 89 and on the representations of their respective counsels, the Court having duly considered same, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

Local 89 shall abide by all the terms providing for injunctive or seniority relief in any court decree or judgment, whether contested or uncontested, arising out of

Civil Action C-77-247M, whether or not any such relief would be in conflict with its collective bargaining agreements with General Telephone Company and West Coast Telephone.

Local 89 will provide plaintiff with copies of any grievance filed with Local 89 by female employees of General Telephone and West Coast Telephone which (1) complain of sex discrimination by any defendant, or (2) complain of denial of a craft job or of a violation of the collective bargaining agreement with respect to a female craft employee. A copy of each such grievance shall be sent to plaintiff's San Francisco Regional Office of General Counsel within 10 days after filing with Local 89.

Upon plaintiff's request in writing specifying one or more areas in which the plaintiff believes that Local 89 is not complying with the terms of this Agreement, Local 89 shall provide such other information as plaintiff reasonably deems necessary to evaluate the extent of Local 89's compliance with this Decree.

This Order is based on an agreement between plaintiff and defendant Local Union No. 89, International Brotherhood of Electrical Workers (Local 89), and shall not be construed to release any other defendant named by plaintiff in this action. Local 89 is released from all claims stated in paragraphs 13 and 14 of plaintiff's First Amended Complaint as set forth in the Stipulation and Order on Second Amendment to Complaint signed by the Court on June 12, 1978.

This Order, issued with the consent of plaintiff and Local 89 prior to the introduction of any evidence, does not constitute an adjudication or finding that there has been a violation of Title VII and should not be construed as an admission by Local 89 of any past discriminatory practice. Local 89 agrees to cooperate with General Telephone Company of the Northwest (General Telephone)



and West Coast Telephone Company of California (West Coast Telephone) in placing women in craft jobs as those jobs are defined by General Telephone and West Coast Telephone in the Employer Information Report EEO-1.

## DURATION OF AGREEMENT

This Agreement shall remain in effect until either (1) the resolution of C77-247M and the expiration of any decree entered by the Court in that action; or (2) the parties agree in writing that the Agreement is no longer warranted.

Plaintiff shall not seek a finding that Local 89 has not complied with this Agreement without first (a) advising Local 89 in writing of any alleged failures to comply; and (b) affording Local 89 a reasonable opportunity to explain or correct the alleged failure to comply.

## COUNSEL APPROVAL

The parties hereto agree to entry of this decree subject to final approval by the Court.

DATE:

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By /s/ Herman L. Wacker
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Attorney for Plaintiff

Dated: Recommended for Entry
December 18, 1978

/s/ Philip K. Sweigert
PHILIP K. SWEIGERT
United States Magistrate
and Special Master

/s/ Walter T. McGovern
WALTER T. McGOVERN
Chief United States District Judge

FOR ARGUMENT

Supreme Court, U.S.
FILED
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No. 79-488

IN THE

# Supreme Court of the United States

October Term, 1979

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GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al.,
*Petitioners,*
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

---

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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# REPLY BRIEF OF PETITIONERS

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**IN THE**

# Supreme Court of the United States

**October Term, 1979**

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GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al.,
*Petitioners,*
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

---

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

# REPLY BRIEF OF PETITIONERS

---

## INTRODUCTION

General Telephone Company of the Northwest, Inc. (GTNW) believes the earlier briefs filed on behalf of petitioners adequately rebut the arguments of the Equal Employment Opportunity Commission (EEOC) set forth in Respondent's Brief, but we will provide a limited response to certain points.

A quick overview of what was admitted by the EEOC, and what was not denied, assists in focusing on the critical issue. The EEOC admits (with our comments in parentheses): (1) the issue is limited to one of statutory interpretation (Resp. Br. 19); (2) a §706 action normally is

triggered by a charge filed by a private party (Resp. Br. 9); (3) the EEOC has discretion in deciding which cases to litigate under §706(f)(1) (while this discretion may assist the EEOC in its statutory role, once the action is filed it does not provide a basis for non-compliance with Rule 23) (Resp. Br. 10 n.3); (4) the EEOC does not have standing to bring suit beyond either the issues raised by the charging party, or which another private party could raise as discovered during the investigation (the effect of which is limited to avoiding having to administratively process the charge by the second party) (Resp. Br. 13); (5) a private party filing a class action under §706(f)(1), 42 U.S.C. §2000e-5(f)(1), must comply with Rule 23 of the Federal Rules of Civil Procedure (Congress intended that the EEOC similarly comply) (Resp. Br. 17); (6) Congress has made the EEOC "a properly suing party" for class actions under §706(f)(1) (which overcomes the class membership requirement under Rule 23) (Resp. Br. 21); (7) associations bringing class actions are governed by Rule 23 (the EECO acts in an analogous manner) (Resp. Br. 22); (8) the relief available for either a private party class action or an EEOC class action is governed by §706(g), 42 U.S.C. §2000e-5(g) (Resp. Br. 19); (9) without application of Rule 23, absent class members are not bound by the judgment in an EEOC class action under §706(f)(1) (Resp. Br. 20, 34); and (10) if this Court concludes, as GTNW contends, that Rule 23 applies to EEOC class actions under §706(f)(1), the EEOC will seek compliance with Rule 23 (Resp. Br. 25).

By omission, the EEOC does not deny that it is bound by the Federal Rules of Civil Procedure in Title VII actions, that superseding of these rules by Congress must clearly



appear and that the legislative history does not clearly show an intent to exempt EEOC class actions under §706(f)(1) from Rule 23 (it tacitly concedes this latter point) (Resp. Br. 26).

The EEOC fails to list any substantial burdens or difficulties in complying with Rule 23, or any substantive effect upon its ability to protect the public interest. Moreover, the EEOC does not deny the significant benefits which Rule 23 brings to litigation of this type. Instead the EEOC asks this Court to sanction a case-by-case equitable remedy approach to overcome the procedural problems it admits will occur by not complying with Rule 23 (Resp. Br. 35).

GTNW contends the express and implied concessions of the EEOC, and the reasons previously advanced on behalf of petitioners, compel the conclusion Congress intended, in enacting the 1972 amendments to Title VII, that the EEOC comply with Rule 23 when it files a class action under §706(f)(1).

## ARGUMENT

### 1. The Present Action is a "Class Action" and Has Been Characterized as a Class Action Throughout This Litigation

The EEOC seeks to re-phrase the issue before the Court and to re-characterize the action as something other than a class action. But as this action has proceeded through the lower courts, it uniformly has been characterized as a class action and no attempt to change the terminology makes it any less of a class action.[1]

1. The EEOC, two weeks after it amended the complaint, moved to bifurcate "the issue of *class* liability from the issue of individual damages" (emphasis added) (A. 12) and continually characterized the action as a "class action" in its supporting memorandum (A. 14-19). (In describing this motion to bifurcate in Respondent's Brief, the EEOC said it

The Court should not be detracted from the substance and character of this litigation by the EEOC's subtle efforts to change the terminology in order to provide a better setting for its subsequent argument.

**2. The EEOC's Standing Does Not Decide the Application of Rule 23**

The EEOC cites a series of cases for the principle that it promotes the public interest and has authority to sue under §706(f)(1) beyond the claims of the individual charging party (Resp. Br. 8-13). But the public interest is also promoted by private actions under §706. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974); *EEOC v. D. H. Holmes*, 556 F.2d 787, 792 n.7 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978). The EEOC cannot bring suit in its own name for any injury to it. Normally a private party files a charge, which the EEOC investigates and attempts to conciliate. If the conciliation efforts are unsuccessful, all that the lower courts have said is that the EEOC has "standing" to bring "a civil action"[2] for all unlawful practices discovered during its investigation. For example, if the civil action includes unlawful practices discovered while investigating the charge filed by the first party, and not alleged by that party, the courts merely have held the EEOC has standing to bring suit on them. The justification is that this avoids the unnecessary administrative delay in requiring a second party to file a charge on these additional unlawful practices and in processing this second charge. The EEOC then stands both in the shoes of the first party and the second party, but no further. If these two parties brought a joint class action under §706(f)(1) they would have to comply with Rule 23. Therefore, when the EEOC brings a §706(f)(1) action in their stead it too should comply with Rule 23.

"moved for an order bifurcating the issue of liability from the issue of individual damages" (Resp. Br. 3), conveniently omitting the reference to "class" prior to "liability.") The magistrate phrased the issue as being "whether the EEOC is required to comply with Rule 23 in order to bring suit on behalf of a class" (Pet. App. A-26). The court of appeals also characterized this as "a §706 class action brought by the EEOC." *EEOC v. General Tel. Co.*, 599 F.2d 322, 332 (9th Cir. 1979) (Pet. App. A-20). In *EEOC v. Page Engineering Co.*, 17 Fair Empl. Prac. Cas. 1638, 17 Empl. Prac. Dec. ¶8603 (N.D. Ill. 1978), the EEOC brought a §706 action and the defendant moved to dismiss the class action allegations in the complaint. The district court noted: "The EEOC *concedes* that it intends this suit to be a *class action* but argues that the provisions of Rule 23 of the Federal Rules of Civil Procedure are not applicable to actions brought by the EEOC." 17 Empl. Prac. Dec. at 7095 (emphasis added).

2. Section 706(f)(1). The EEOC also mentions the general authority granted it under §706(a), 42 U.S.C. §2000e-5(a), in support of certain arguments throughout its brief. But §706(a) also states that this general authority is limited "as hereinafter provided," which refers not to a general mandate to the EEOC to sue whenever and however it desires, but to the specific statutory scheme for charges, processing, conciliation and then, and only then, "a civil action" per §706(f)(1).



**3. Our Issue Concerns the Procedure By Which the Litigation Will be Pursued—It Does Not Concern the Remedy**

After re-characterizing the issue and the type of action it is pursuing under §706(f)(1), the EEOC relies heavily upon *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946), for its subsequent argument. The reliance is misplaced.

*Porter v. Warner Holding Co.* "concerned . . . the *power* of a federal court" to provide a remedy under its equitable jurisdiction. 328 U.S. at 396 (emphasis added). The case did not concern procedure in general, much less Rule 23 or class actions per se, and it preceded our present Rule 23 by 20 years. The scope of the "remedy" which a court can provide under its equitable jurisdiction in §706(f)(1)

actions is not our issue, as it was in *Porter*. Congress has been very specific in describing the remedies available, which are set forth in §706(g).[3]

The Emergency Price Control Act of 1942 described in *Porter v. Warner Holding Co.*, and various other statutory enactments referenced by the EEOC,[4] were enacted by Congress for specific purposes and with unique procedures for each, just as was Title VII. It is difficult to compare these various statutory procedures with Title VII due to these differences, with one important exception—in none of the other statutory schemes can the government bring suit on behalf of a class and bind the employer/defendant to the individual relief granted absent members of the class if the government prevails, but not bind these members if the employer/defendant prevails, which is what the EEOC seeks to do under §706(f)(1).[5]

**4. The Legislative History Supports Conclusion that Rule 23 Applies to EEOC §706(f)(1) Actions**

The EEOC's conclusion about the proper interpretation of the legislative history of Title VII is improperly premised upon *Porter v. Warner Holding Co., supra.* There was no

3. Section 706(g) is set forth at Pet. App. A-39 and A-40. It permits injunctive relief, reinstatement, hiring, back pay "or any other equitable relief as the court deems appropriate."

4. Resp. Br. 11 n.5, 14 n.8 and 18 n.13.

5. For example, a specific written consent form for each party-plaintiff is the procedure under both the Fair Labor Standards Act, 29 U.S.C. §216(b), and the Age Discrimination in Employment Act, 29 U.S.C. §626; Rule 23-type class actions are unavailable. *LaChapelle v. Owens-Illinois*, 513 F.2d 286 (5th Cir. 1975); *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859 (9th Cir. 1977). If the government brings suit under the FLSA or ADEA, the right of individual employees to bring an action, or to become a party-plaintiff to an action, is terminated. This type of fairness to the employer, finality and elimination of further litigation is the similar benefit which application of Rule 23 will bring to EEOC class actions.



traditional (and limited) rule that government class actions initiated by an individual charging party were not covered by the Federal Rules of Civil Procedure; there were merely various congressional enactments unique in themselves with regard to the purpose for which they were enacted and the statutory procedure which Congress selected. Congress described the "remedy" for Title VII in §706(g), but the new *procedure* under the 1972 amendments was to increase the enforcement power of the EEOC by permitting it to also sue under §706(f)(1) in accordance with the normal rules of court. See Petitioners' Brief at 12-14. This limited rule concept argued by the EEOC was not relied upon by the court of appeals below, nor by the various district courts either.[6]

The Congressional history was extensive and clear that the court-enforcement approach was adopted so the EEOC would *not* be "the prosecutor, the judge and . . . the executioner," but instead there would be "a hearing according to the rules of procedure . . . before impartial judges rather than biased crusaders."[7] Instead what we have under the decision by the court of appeals is the situation where two

Under the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, only the Board can prosecute an unfair labor practice; there is no separate cause of action by individuals for damages, such as lost wages, due to an employer's unfair labor practices. *Amalgamated Utility Workers v. Consolidated Edison*, 309 U.S. 261, 269-70, 60 S. Ct. 561, 565, 84 L. Ed. 738 (1940); *Schatte v. Intl. Alliance*, 182 F.2d 158, 166 (9th Cir. 1950), *cert. denied*, 340 U.S. 827, *reh. denied*, 340 U.S. 885 (1950).

6. These cases are set forth in Petitioners' Brief at 9 n.3. The three exhaustive law review articles noted therein reviewed the legislative history in detail and never suggested Congress ever considered this concept in giving the EEOC authority to sue under §706(f)(1), nor did any of those articles even cite *Porter v. Warner Holding Co., supra.*

7. EEOA Legislatory History at 1661. See Petitioners' Brief at 12 n.14 and 13.

of the most critical decisions in the lawsuit, which Congress intended the courts should make as they traditionally have done under Rule 23, have been made by the EEOC, i.e., that the lawsuit should proceed as a class action, and what the scope of the class should be. In other words, the EEOC has usurped the class certification responsibility of the court; this was not what Congress intended.

**5. Application of Rule 23 to EEOC Class Actions Will Benefit the Parties and the Courts**

Requiring the EEOC to comply with the class certification requirements of Rule 23 will benefit it, employers, employees and the courts by providing definition to the class, delineating its scope, preventing piecemeal and multiple litigation, ensuring res judicata effect with a settlement or decision, and by better judicial control. There are no great barriers for the EEOC to overcome. The strong public policy reasons behind Rule 23, which make adherence to it in Title VII litigation indispensable,[8] apply equally to EEOC class actions under §706(f)(1).[9] Similar class actions under §706(f)(1) are successfully handled daily by private parties with much less expertise, experience and resources than the EEOC, and it will be able to do likewise in accordance with the intent of Congress.

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8. See *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977), where Mr. Justice Stewart, speaking for an unanimous Court, stated:

> We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. *But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable.*

431 U.S. at 405 (emphasis added).

9. As the district court concluded in *Local 194 v. Standard Brands*, 74 C 0587, Slip. Op. at 16 (N.D. Ill., December 6, 1979):

> The Court finds no justification for distinguishing between private actions and EEOC actions under §706 under the *Rodriguez* rule.



## CONCLUSION

The decision by the court of appeals should be reversed.

March 18, 1980.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term, 1979

No. 79-488

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al.,

*Petitioners,*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-488

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GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., et al.,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

==========

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

==========

BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS AMICUS CURIAE

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## Interest of Amicus

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation established under the laws of the State of New York.

It was founded to assist black persons to secure their constitutional and statutory rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to black persons suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in litigation before this Court and the lower courts involving a variety of race discrimination issues regarding employment. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). The Legal Defense Fund believes that its experience in such litigation and the research it has performed will assist the Court in this case. The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk.

## Question Presented

Whether Section 706(f)(1) and (g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) and (g) (1976), by providing that the Equal Employment Opportunity Commission "may bring a civil action" seeking a decree ordering



"such affirmative action as may be appropriate, which may include... back pay," requires compliance with the requirements of Rule 23, Fed. R. Civ. P., and amends this Rule so as to make its provisions, to the extent possible, applicable to such an action.1/

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1/ The view that prevails in the courts gives a negative answer to this question. EEOC v. Federal Reserve Bank, 21 FEP Cases 742 (S.D.N.Y. 1979); EEOC v. Mid-City Care Center, 20 EPD. ¶ 30,275 (W.D. Tenn. 1979); EEOC v. Stroh Brewery, 19 EPD. ¶ 9226 (E.D. Mich. 1979); EEOC v. Avco New Idea Div., 18 FEP Cases 311 (N.D. Ohio 1978); EEOC v. Singer Controls Co., 80 F.R.D. 76 (N.D. Ohio 1978); EEOC v. International Tel. and Tel., Civ. No. 77-790 (D.N.J. Mar. 16, 1978); EEOC v. Raymond Metal Prods. Co., 17 FEP Cases 206 (D. Md. 1978); EEOC v. Schlueter Mfg. Co., 17 FEP Cases 53 (E.D Mo. 1978); EEOC v. Whirlpool Corp., 80 F.R.D. 10 (N.D. Ind. 1978); EEOC v. Pinkerton's Inc., 14 FEP Cases 1431 (W.D. Pa. 1977); EEOC v. CTS of Asheville, Inc., 13 FEP Cases 852 (W.D.N.C. 1976); EEOC v. Vinnell-Dravo-Lockheed-Mannix, 417 F. Supp. 575 (E.D. Wash. 1976); EEOC v. Rexene Polymers Co., 10 FEP Cases 61 (W.D. Tex. 1975); EEOC v. Lutheran Hospital, 10 FEP Cases 1177 (E.D. Mo. 1974); EEOC v. Mobil Oil Corp., 6 FEP Cases 727 (W.D. Mo. 1973). But the Fifth Circuit and a few district courts from other circuits have given an affirmative answer. EEOC v. D.H. Holmes Co., 556 F.2d 787 (5th Cir. 1977), cert. denied, 436 U.S. 962 (1978); Local 194, Retail, Wholesale, and Department Store Union v. Standard Brands, Inc., Civ. No.74-587 (N.D. Ill. Dec. 6, 1979); EEOC v. Westinghouse Elec. Corp.,

## Statement of the Case

The Equal Employment Opportunity Commission (EEOC) brought this action under Section 706(f)(1) and (g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) and (g) (1976). Alleging that defendants discriminated against women employees with respect to access to craft jobs, promotion to managerial positions, and maternity leave, the EEOC's complaint prays for injunctive relief and back pay for the indi-

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1/ cont'd.

81 F.R.D. 528 (M.D.N.C. 1979); EEOC v. Delaware Trust Co., 81 F.R.D. 448 (D. Del. 1979); EEOC v. Page Engineering Co., 17 EPD ¶ 8603 (N.D. Ill. 1978); EEOC v. Akron Nat'l Bank & Trust Co., 78 F.R.D. 684 (N.D. Ohio 1978); EEOC v. Continental Oil Co., 13 FEP Cases 785 (D. Colo. 1975), aff'd on other grounds, 584 F.2d 884 (10th Cir. 1977). The commentators appear divided. Compare Reiter, The Application of Rule 23 to EEOC Suits: An Examination of EEOC v. D.H. Holmes Co., 28 Syr. L. Rev. 741 (1977) (negative) with Comment, Certification of EEOC Class Suits Under Rule 23, 46 Univ. Chi. L. Rev. 690 (1979); Bumpass, The Application of Rule 23 of the Federal Rules of Civil Procedure to Actions Brought by the Equal Employment Opportunity Commission, 29 Case West. Res. L. Rev. 343 (1979) (affirmative).



viduals affected by the challenged discriminatory practices. These forms of relief are specifically authorized by Section 706(g) of Title VII.

The district court referred the action to a magistrate for trial. On the same day, defendants moved "to dismiss the class action aspects of plaintiff's complaint" on the ground that the Commission had failed to move for certification as a class representative pursuant to Rule 23 within the time limit set by a local rule of the Western District of Washington. The magistrate found that Rule 23 did not apply to the action brought by the Commission and recommended that the motion be denied. The district court adopted this recommendation.

An interlocutory appeal from this ruling was certified in accordance with 28 U.S.C. § 1292(b) (1976). The court of appeals affirmed. It held that Rule 23, on its face, cannot be applied to an action brought by the Commission and ruled that Section 706 of Title VII does not require performance of the impossible task of applying Rule 23 to an action for which it clearly had not been

written. The court of appeals stressed that its ruling would have the desirable consequence of avoiding "the inevitable challenge to the EEOC as a class representative" and a "certification process [that] would be time consuming and costly, and would serve no useful purpose...." EEOC v. General Telephone Co., 599 F.2d 322, 334 (9th Cir. 1979).

## Summary of Argument

### I

Rule 23, on its face, cannot be applied to an action brought by the EEOC under Section 706 of Title VII. The EEOC can never meet the requirements of Rule 23(a)(3) and (4), since it is not a member of the class it represents, since its claim is not typical of the claims of the class, and since it cannot so adequately and fairly represent the class as to justify binding its members by judgment. Hansberry v. Lee, 311 U.S. 32 (1940). In addition, the EEOC will in many cases not be able to meet other requirements of Rule 23. See EEOC v. Westinghouse Electric Corp., Nuclear Turbine Plant, 81 F.R.D. 528 (M.D. N.C. 1979)(EEOC held to fail to meet commonality and typicality requirements).



### II

Neither the clear and plain statutory language nor the legislative history permits reading into Section 706 the two provisions that are needed to make Rule 23 applicable to Section 706 actions. They do not permit interpolation of a provision into Section 706 requiring that the EEOC comply with Rule 23, and they do not permit interpolation of the amendment to Rule 23 that would be needed to make it applicable to Section 706 actions. Distortion of the plain meaning and legislative history of Section 706 to reach these results would frustrate the clear legislative purpose of giving the EEOC the right to seek class relief in actions which are different from, and therefore need not comply with the requirements for, Rule 23 class actions.

### III

Section 706 grants the EEOC a right of action that is sui generis. By an action under Section 706, the Commission vindicates the public interest and, in a certain measure, the interests of the victims of the discrimination alleged. While, in

seeking to obtain appropriate relief for the victims of discrimination, the Commission acts as the representative of a class of victims, the Commission's action is not a class action in the sense of Rule 23. For the judgment rendered in such an action is binding only upon those members of the class who intervened in the action or who accepted compensation under the judgment and knowingly waived their individual rights of action.

The attempt to superimpose, to the extent possible, the requirements of Rule 23 on an action under Section 706 is inspired by the desire to limit substantially the availability of such an action. Imposition of such a limitation would frustrate the legislative intent of broadening the availability of relief from discrimination by giving the EEOC its own right of action, in addition to already available class actions under Rule 23 by private litigants.



## Argument

### I

### RULE 23, BY ITS CLEAR TERMS, CANNOT BE APPLIED TO AN ACTION BROUGHT BY THE EEOC UNDER SECTION 706 OF TITLE VII.

#### A. An Action Under Section 706 Cannot Meet the Basic Requirements of Rule 23(a).

Any action, in order to qualify as a class action under Rule 23, must meet the requirements specified in Rule 23(a). An action by the EEOC under Section 706 can never meet three of the five requirements this paragraph imposes.

1. The EEOC is not a member of the class.

First, the Commission cannot qualify as "[o]ne or more members of a class [who] may sue or be sued as representative parties on behalf of all" within the meaning of Rule 23(a). The Commission has not been the victim of the alleged discrimination and therefore cannot be a member of a class composed of victims of such discrimination. Of course, Section 706 gives the Commission standing to sue and renders it a real party in interest. But it does not, and cannot, make the Commission a member of a class of which it is not a member.

The Fifth Circuit in EEOC v. D.H. Holmes Co., 556 F.2d 787 (1977), cert. denied, 436 U.S. 962 (1978), disregarded the clear and unambiguous language of Rule 23(a) by stressing that Congress clearly intended to give the Commission the right to recover back pay for members of the class and therefore must have intended to authorize the Commission to bring a class action under Rule 23.[2/] The non sequitur in the court's reasoning is obvious: The circumstance that Congress gave the Commission the right to sue on behalf of individual victims of discrimination by no means warrants the conclusion that Congress wished to subject the Commission to the class action regimen of Rule 23. On the contrary, since the facial inapplicability of Rule 23 to a Section 706 action is so obvious, the only conclusion warranted is that Congress intended to give the Commission the right to bring an action that is not a Rule 23 class action, but a statutory action sui generis.

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2/ The Fifth Circuit put it thus:

> The crux of the matter is this: Having been set up by law to bring civil actions on behalf of persons allegedly discriminated against, EEOC has standing to sue, is a real party in interest, and, we hold, for purposes of Rule 23, is a member of the class. 556 F.2d at 797.



The precise nature of this action and its apt accommodation of the Commission's public interest in combating discrimination to the interests of the individual victims of discrimination will be discussed below. It suffices to stress here that rejection of the applicability of Rule 23 to Section 706 actions is wholly compatible with recognition of the Commission's right to bring a quite different form of action on behalf of a group of affected persons.

2. The EEOC's claim is not typical of the claims of the class.

Second, the Commission's claim is not "typical" of the claims of the class within the meaning of Rule 23(a)(3). Since the Commission has no claim of discrimination of its own, its claim cannot be typical of the claims of the victims of discrimination. The Fifth Circuit, in EEOC v. D.H. Holmes Co., supra, completely disregarded this requirement. It is clear, however, that if Rule 23 is to be applied to a Section 706 action, this requirement would have to be met. And since it cannot be met, Rule 23 could be applied to a Section 706 action only if Section 706 could somehow be construed as amending Rule 23.

There is no basis for concluding that Rule 23 has been amended sub silentio so as to make its typicality requirement inapplicable to EEOC actions under Section 706. The fact is that the Commission's claim is not typical of the claims of individual members of a class. And the Commission's inability to meet the requirement of typicality makes it impossible for the Commission to qualify as a member of a class who can bind other members of the class. As this Court has stressed, the requirement of typicality is imposed in order to ensure that class representatives "possess the same interest and suffer the same injury" as the class members. East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403 (1977). Only if that requirement is met, can there be a reasonable assurance that the representative will so adequately represent the class that it can properly bind its members.

The courts have therefore properly insisted on compliance with this requirement in all cases in which a government agency has brought a Rule 23 class action. See, e.g., Illinois ex rel. Bowman v. Home Federal Savings & Loan Association, 521 F.2d 704 (7th Cir. 1975); In re Anthracite



Coal Antitrust Litigation, 78 F.R.D. 709, 717-18 (M.D. Pa. 1978).[3/] If EEOC actions under Section 706 were to be brought only as Rule 23 class actions, the Commission would therefore have to comply with the requirement of typicality. At least one court has already reached this conclusion and refused to certify a Section 706 action as a class action due in part to the Commission's failure to meet the typicality requirement. EEOC v. Westinghouse Elec. Corp., Nuclear Turbine

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3/ The Commission is therefore in a position that is quite different from that of the associations that were held proper class representatives in decisions such as Smith v. Board of Education, 365 F.2d 770, 777-78 (8th Cir. 1966), and Undergraduate Student Association v. Peltason, 359 F. Supp. 320, 323 (N.D. Ill. 1973). The associations in those cases had been formed by individual members of the class to promote the interests sought to be vindicated in those class actions. In those cases, individual members of the class appeared as individual parties plaintiff along with the association. In addition, the consequence of the ruling was to permit broadened class relief that would otherwise not have been available. The Commission is, of course, not a voluntary association formed by members of the class. And it needs no expansive reading of Rule 23 in order to be able to bring an action on behalf of the victims of discrimination.

Plant, 81 F.R.D. 528 (M.D.N.C. 1979). The Commission's inability to meet this requirement provides additional evidence that an EEOC action under Section 706 is not a Rule 23 class action, but a different form of action which does not result in a judgment that is preclusive against non-participating members of the class.

3. The EEOC cannot fairly and adequately protect the interests of the class.

Third, the Commission cannot meet the requirement of Rule 23(a)(4) that it "fairly and adequately protect the interests of the class." The instant case is highly unusual. For it is the Commission itself that is asserting that it cannot so fairly and adequately represent the interests of the class members as to justify the rendition of a judgment under Rule 23 that would bind all members of the class. One may well ask why the defendants cast themselves into the unusual role of arguing that the class representative, who denies that it can fairly represent the class, can do so. After all, it is normally the defendant who contests that the plaintiff can bring a class action. No doubt, defendants expect that, if only



it can be established that Section 706 actions must meet the requirements of Rule 23, it will become much easier to defeat such actions, by arguing in individual cases that the Commission has not met them.

Whatever the defendants' motivation, it is clear that a judicial decision holding, over the plaintiff's objection, that the plaintiff so adequately represents the class that it can render a judgment binding upon the class, would raise serious constitutional problems. This Court has long held that members of a class can be bound by a judgment only if their representative represents them fairly and adequately. Hansberry v. Lee, 311 U.S. 32 (1940). It would be anomalous, indeed, if this Court were to hold that the class members are bound, even though their representative strongly contests that it can so adequately and fairly represent them as to make it compatible with due process to bind them.

Fortunately, the Court need not address this question. The Commission has itself recognized that its "interests transcend those of the complainant and may differ in significant ways." Petition For a Writ of Certiorari to the United

States Court of Appeals for the Fifth Circuit in EEOC v. D.H. Holmes, Inc., October Term, 1977, Supreme Court of the United States at 10. See also EEOC v. D.H. Holmes, Co., supra, 556 F.2d at 797. As held in EEOC v. Occidental Life Insurance Co., 535 F.2d 533, 542 (9th Cir. 1976), aff'd, 432 U.S. 355 (1977), "the EEOC is charged with the vindication of public policy, not merely with the enforcement of private rights."

In its efforts to promote the public policy of eliminating discrimination, the EEOC may well be less than insistent that the employer grant to individual employees all benefits that they lost as the result of discrimination. After all, the "primary role of the EEOC is to seek elimination of unlawful employment practices," Hutchings v. United States Industries, Inc., 428 F.2d 303, 309 (5th Cir. 1970), and the EEOC may be prepared to settle for less back pay than may legally be due in exchange for a broad prohibition of alleged discriminatory practices. In addition, the Commission, as this Court has noted in Occidental Life Insurance Co. v. EEOC, supra, 432 U.S. at 362, has a "burgeoning workload, accompanied by



insufficient funds and a shortage of staff," and may find that its limited resources are better applied towards obtaining comprehensive prohibitions of discriminatory practices than to vigorous pursuit of indiviuals' claims for back pay.

The opinion in Winfield v. St. Joe Paper Co., 20 FEP Cases 1103 (N.D. Fla. 1979), provides an apt illustration of the Commission's practical predicament in serving the public interest of eliminating discriminatory employment practices and pursuing at the same time claims for back pay of individual employees. In that case, the Commission negotiated a conciliation agreement providing for certain types of affirmative relief for a group of black employees for payment of specified amounts of back pay. An agent of the Commission persuaded the covered employees to accept the agreement and sign releases by making such statements as, "a bird in the hand is worth two in the bush" and "take it or leave it, [and] get your own lawyer." 20 FEP Cases at 1110. The court held that the employees who signed the releases had not knowingly waived their rights to the additional back pay to which they might be legally entitled.

The EEOC's approach to a case of discrimination in employment will necessarily differ from that of individual employees intent upon getting their due. Proper recognition of that difference compels the conclusion that the Commission cannot constitutionally be a proper representative in an action that would result in a judgment binding upon individual employees.

B. An Action Under Section 706 Will, in Many Instances, Not Be Able To Meet Additional Requirements Imposed by Rule 23.

Not only can an action brought by the EEOC under Section 706 never meet the three requirements specified in Rule 23(a)(3) and (4), such an action would, in many instances, not be able to meet additional requirements imposed by Rule 23.

If the victims of the alleged discrimination are not so numerous that their joinder would be impracticable, the requirement of Rule 23(a)(1) could not be met. Dismissal of a Section 706 action on the ground that the number of employees affected by the discrimination is relatively small would be particularly anomalous. For it would



permit the Commission to bring actions only in cases in which the number of employees affected is very large and the litigation burden on the Commission correspondingly heavy, while precluding the Commission from obtaining injunctive relief and back pay for a relatively small number of employees. Clearly, a result so obviously at odds with the legislative intent condemns itself. As the court stated in EEOC v. Whirlpool Corp., Local 808, 80 F.R.D. 10, 19 (N.D. Ind. 1978):

> [I]f the Rule 23 numerosity requirement were applied to Commission actions, in cases where the class of aggrieved employees is too small for that requirement to be met, those discriminatees would as a practical matter often be left without legal recourse.

Application of Rule 23 to Section 706 actions would also preclude such actions if the employer's discriminatory practices differed in regard to individual employees and their resulting injuries differed correspondingly. For in such cases, the court might be unable to find that the employer had acted "on grounds generally applicable to the class" within the meaning of Rule 23(b)(2). Here again, the decision in EEOC v. Westinghouse

Elec. Corp., Nuclear Turbine Plant, supra, is most instructive. In this case, the court first rejected, on the authority of Holmes, the EEOC's contention that its Section 706 action was not subject to Rule 23, and the court then refused to certify the action as a class action under Rule 23 in part because of the EEOC's failure to meet the requirements of Rule 23(b)(2). The decision provides a graphic illustration of the undue benefits employers will seek to draw from application of Rule 23 to Section 706 actions.

C. Subjecting Section 706 Actions to Rule 23 Requirements Would Greatly and Unfairly Add to the EEOC's Burdens and Would Substantially Weaken Enforcement of Title VII.

As demonstrated, the plain language of Rule 23 makes clear its inapplicability to EEOC actions under Section 706. Moreover, any attempt to distort and eviscerate Rule 23 so as to render it applicable to Section 706 actions would burden such actions with procedural requirements that make no sense. Virtually all the requirements of Rule 23 that a Section 706 action could never, or infrequently, meet are based on the notion that



adequate, although often most burdensome, procedural requirements must be met before an action can be permitted to go forward that is to result in a judgment binding upon the persons represented. But since a Section 706 action will not result in such a judgment, there is no need to impose these requirements. These would merely render Section 706 actions more complex, time-consuming, and expensive without producing a judgment binding on the class.

The inappropriateness of trying to apply Rule 23 to EEOC actions under Section 706 is highlighted by the circumstance that the quite similar pattern or practice action under Section 707 has never been ruled subject to Rule 23 requirements. Even the Fifth Circuit, in Holmes, held that Rule 23 did not apply to Section 707 actions. 556 F.2d at 792, n.8. However, if, as the courts have unanimously ruled, a Section 707 action is not subject to Rule 23, an action under Section 706 should equally not be subject to that Rule. In both types of actions, the Commission sues on behalf of employees who are victims of discrimination and, in both types of actions, the Commission may seek back pay and other relief on behalf of such

employees. Sections 706(g) and 707(e) (last sentence) of Title VII, 42 U.S.C. §§ 2000e-5(g), 2000e-6(e) (1976).

No court that has held Rule 23 applicable to Section 706 actions has satisfactorily explained how such a ruling can be reconciled with the often simultaneously expressed and indubitably correct view that Rule 23 does not apply to Section 707 actions. The incongruity of the view that Rule 23 does apply to Section 706 actions is dramatically illustrated by EEOC v. Akron Nat. Bank & Trust Co., 78 F.R.D. 684 (N.D. Ohio 1978). In this case, the court felt compelled to follow the Fifth Circuit's ruling in Holmes that Rule 23 applied to a Section 706 action, but also felt compelled to hold, on substantially the grounds advanced here, that the Commission could never meet the requirements of Rule 23. Seeking to escape from so incongruous a result, the court then permitted the Commission to amend its complaint to allege a claim under Section 707, in which the Commission could seek exactly the same relief, including back pay, which it had sought in the Section 706 action.



The court's decision that back pay was recoverable in a Section 707 action is squarely supported by Section 707(e) (which provides that such an action shall be conducted as provided in Section 706), by the Sixth Circuit's decision in United States v. Masonry Contractors Association, 497 F.2d 871 (6th Cir. 1974), and by the Fifth Circuit's own decision in United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973). And the court's evident relief that it could permit the Commission to seek the same remedies for affected individuals under Section 707 without being hamstrung by Rule 23 testifies to the impropriety of imposing the inappropriate and burdensome requirements of Rule 23 on EEOC actions under Section 706.

## II

## SECTION 706 OF TITLE VII DOES NOT REQUIRE THE EEOC TO COMPLY WITH RULE 23 AND DOES NOT AMEND RULE 23 SO AS TO MAKE IT APPLICABLE TO ACTIONS BROUGHT BY THE EEOC.

### A. The Plain Text of Section 706 Gives the EEOC the Right To Bring This Action Without Complying With Rule 23.

Section 706's language is plain and clear. It gives the Commission, in explicit and unqualified terms, the right "to bring a civil action"

seeking an order directing "such affirmative action as may be appropriate, which may include....back pay." Section 706(f), (g) of Title VII, 42 U.S.C. § 2000e-5(f), (g) (1976). Defendants seek to rely on statements made by Senators Javits and Williams, in an attempt to persuade this Court to disregard Section 706's plain language. This effort cannot succeed. As this Court noted in TVA v. Hill, 437 U.S. 153, 184 n.29 (1978):

> When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning. Ex parte Collett, 337 U.S. 55, 61 (1949), and cases cited therein. Here it is not necessary to look beyond the words of the statute....

To the same effect, see Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492 (1947) ("We are invited to make a lengthy examination of views expressed in Congress....There is, however, no ambiguity in this Act to be clarified by resort to legislative history....").

Moreover, the legislative history of Section 706 is wholly compatible with this section's plain meaning. Defendants seek to put a construction upon the legislative history in an effort to change the plain and clear language of Section 706 in two crucial respects: First, they urge



that the legislative history requires reading into Section 706 an amendment to Rule 23 that can nowhere be found in the clear statutory language; and second, they urge that the legislative history requires reading into Section 706 limitations upon the unqualified right of action given to the Commission that cannot possibly be found in Section 706's clear language.

The legislative history cannot accomplish this legerdemain. The attempt to rewrite the clear text of Section 706 by reliance upon legislative history that, at best, is highly ambiguous, and, if properly read, supports the plain meaning of Section 706, should be rejected. Such an attempt seeks to curtail drastically the powers of the EEOC to vindicate the public interest in eradicating discrimination. These powers the legislature clearly sought to enlarge, not to curtail.

As defendants have themselves stressed (Petitioners' Brief, p. 8), "amendments by implication are not favored. United States v. Welden, 377 U.S. 95, 84 S.Ct. 1082, 12 L.Ed. 2d 152 (1964); Silver v. New York Stock Exchange, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed. 2d 389 (1963)." Defen-

dants seek to persuade this Court to rule not only that Section 706 amends by implication Rule 23, but also that the legislative history amends by implication Section 706 itself. As they themselves recognize, this attempt at double amendment by implication is not "favored." Indeed, it manifestly violates the clear legislative intent.

B. The Legislative History of Section 706 Confirms That the Legislature Intended To Give the Commission the Right To Bring Section 706 Actions Without Complying with Rule 23.

Defendants have argued that statements made by Senator Javits during the Senate debates on the 1972 amendments to Title VII support their view that the legislature intended Section 706 actions to be subject to Rule 23. The statements to which they refer appear in 118 Cong. Rec. 4081-82 (1972), reprinted in Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, p. 1589-90 (1972).

These statements do not refer to Section 706 actions at all. On the contrary, Senator Javits made these statements in regard to Section 707 actions. Not only are these actions not at issue here, but all courts that have passed on the question, including the Fifth Circuit in Holmes, have ruled that these statements do not justify reading into Section 707 what defendants argue should be read into Section 706. Specifically, these courts have refused to read Section 707 as somehow making Rule 23 applicable to Section 707 actions (see p. 21 supra). That being so, it is hard to understand how Senator Javits' statements, which could not change the clear text of Section 707 in regard to which they were made, could change the clear text of Section 706 in regard to which they were not made.



In any event, Senator Javits' statements cannot justify changing the clear texts of Section 706 and Rule 23 in the manner espoused by the defendants. The first part of Senator Javits' statement reads as follows:

> These [i.e., Section 707 actions] are essentially class actions, and if they [i.e., the EEOC] can sue for an individual claimant, then they can sue for a group of claimants [emphasis and matter in brackets supplied]. 118 Cong. Rec. 4081 (1972), reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, p. 1587.

Of course, even if this statement had been made in regard to Section 706 actions, it could not be construed as intending to express the

legislative intent that the actions to which it addressed itself were to be governed by Rule 23. All Senator Javits stated was that the actions of which he spoke were essentially class actions. This statement is wholly accurate: Section 707 as well as Section 706 actions are in their essence class actions, for they are actions brought by a representative on behalf of a class.

But this in no way means that they are class actions in the sense of Rule 23. They share the essential characteristic of Rule 23 class actions in that they are actions brought on behalf of a class, but differ from Rule 23 class actions in that they cannot comply with the requirements for the bringing of such actions and therefore result in judgments different from those rendered in such actions.

Defendants incorrectly assume that the only class actions that can exist are class actions of the kinds dealt with in Rule 23. Former Rule 23, as construed by the courts, recognized the so-called spurious class action, which was essentially a permissive joinder device and led to a judgment binding only on members of the class who



had intervened in the action. See James & Hazard, Civil Procedure, § 10.18 (2d ed. 1977). This type of class action is no longer part of Rule 23, as amended. But a Section 706 action brought by the EEOC is a variant upon the old spurious class action. It differs from it in that the Commission rather than a member of the class brings the action, but it resembles it in that the judgment rendered in it binds only the members of the class who have intervened or who have accepted their rights under it and knowingly waived any additional rights they might have. Accordingly, Senator Javits' statement that Section 707, and for that matter Section 706, actions brought by the Commission are essentially class actions is entirely accurate.

Senator Javits continued in his statement with a discussion of class actions, in an effort to familiarize his colleagues with the institution:

> It seems to me that this [i.e., class actions] is provided for by the rules of civil procedures in the Federal courts, and also it is inherent in the amendment which we adopted....[T]he Commission can only proceed by suit. And if it proceeds by suit, then it can proceed by class suit. If it proceeds by class suit, it is in the position of doing exactly what the Department of Justice does in pattern and practice suits.

> I have referred to the rules of civil procedure, I now refer specifically to rule 23 of those rules, which is entitled "Class Actions" and which give the opportunity to engage in the Federal Court in class actions by properly suing parties: We ourselves have given permission to the EEOC to be a properly suing party.

118 Cong. Rec. 4081-82 (1972), reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, p. 1589-90.

On their face, these statements are wholly in accord with Senator Javits' earlier statement that Section 707 actions are essentially class actions. All Senator Javits did was indicate additionally what kinds of actions class actions were, that the basic notion of class actions was a familiar one, recognized in the Federal Rules of Civil Procedure, and that Section 707 actions were essentially of the same type. But nowhere did Senator Javits say that Section 707 actions were to be subject to, and would have to meet the requirements of, Rule 23. To the same effect, see Reiter, The Application of Rule 23 to EEOC Suits: An Examination of EEOC v. D.H. Holmes Co., 28 Syr. L. Rev. 741, 753, n.72 (1977).



On the contrary, what Senator Javits did state explicitly is that "if it [i.e., the Commission] proceeds by suit, then it can proceed by class suit." He thus put beyond doubt that the Commission, if it decided to sue, would have to meet no additional requirements for bringing a class action. He added that, if the Commission "proceeds by class suit, it is in the position of doing exactly what the Department of Justice does in pattern and practice suits."

At the time Senator Javits made this statement, the Attorney General had never been required to satisfy Rule 23 in pattern and practice suits. And, in fact, no court has ever held either the Attorney General or the EEOC to the requirements of Rule 23 in such actions. Clearly, therefore, Senator Javits' statement explicitly confirms that, if the Commission proceeds by class suit, it need not meet the requirements of Rule 23.

Other legislative history relied on by defendants appears in the section-by-section analysis provided by Senator Williams. 118 Cong. Rec. 4942 (1972), Legislative History of the Equal Opportunity Act of 1972, p. 1173. We

submit that the following statement by Senator Williams confirms that Rule 23 does not apply to Section 706 actions:

> In establishing the enforcement provisions under this subsection and subsection 706(f) generally, it is not intended that any of the provisions contained therein are designed to affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure.

This statement stresses that actions by the Commission do not in any way affect class actions brought under Rule 23 by private litigants. It was important for Senator Williams to stress this, for it dispelled the notion that actions brought by the Commission would displace Rule 23 class actions by private litigants. As Senator Williams noted, "the leading cases in this area to date have recognized that Title VII claims are necessarily class action complaints."

Therefore, while Senator Williams' statement provides no support whatsoever for the contention that the legislature intended Rule 23 to apply to Section 706 actions by the Commission, it does support the view advanced here that actions by the Commission under Section 706 are additional to,



and different from, actions brought by private litigants under Rule 23.

Defendants have also made reference to other legislative history materials indicating that Congress intended the Federal Rules of Civil Procedure to apply to Section 706 actions. Of course, no one denies that these rules apply to civil actions brought by the Commission. Rule 1 explicitly so provides. But this does not mean that rules on their face inapplicable, such as Rule 23, apply to EEOC actions under Section 706.

Thus, the legislative history, although scant, supports the view that the Commission, in bringing Section 706 actions, need not comply with Rule 23. Plain meaning and legislative history therefore permit only one conclusion. As Senator Javits put it: "[I]f it [i.e., the Commission] proceeds by suit, it can proceed by class suit."

## III

## THE EEOC ACTION AUTHORIZED BY SECTION 706 IS SUI GENERIS.

The failure to recognize that Rule 23 class actions are not the only kinds of actions on behalf of a class, and that Section 706 authorizes the EEOC to bring a special and different kind of action, has been a root problem. Even the Ninth Circuit in the instant case, although properly holding that the Commission need not comply with Rule 23 in bringing a Section 706 action, appears to assume that Section 706 dispenses with the requirement of class certification, but that "other procedures of Rule 23 ... are available to the courts in an EEOC action." 599 F.2d at 333. The fact is, however, that the legislature has created a variant of class action that is not governed by Rule 23 for the simple reason that Rule 23 was not written for that type of class action and cannot properly be applied to it.

When the legislature decided to authorize the EEOC to bring an action on behalf of individual employees, it departed from an essential characteristic of the Rule 23 class action, for it



authorized a government agency, rather than an individual claimant who was a member of the class, to bring the action. This departure had significant consequences. Since the Commission is not a member of the class and has no claim of discrimination of its own, it is wholly different from the typical class action plaintiff in a Rule 23 action. Specificially, it cannot meet the requirements of Rule 23(a)(3) and (4), which seek to insure that the plaintiff's interest in the relief sought be the same as that of the members of the class it represents and that, as a result, the plaintiff can adequately represent, and therefore can constitutionally bind, the members of the class. However, since by definition the Commission's interest cannot be the same as that of the members of the class it represents, it cannot so adequately represent them that it can constitutionally bind them. Consequently, the Commission cannot bring a Rule 23 action whose purpose it is to produce a judgment binding upon the class. Instead, it can bring only an action on behalf of a class that is not binding upon all members of the class.

The Commission has itself consistently recognized that it cannot so adequately represent the class as to bind it by judgment. Its brief in the instant case and its petition for certiorari in the Holmes case are squarely based on its confessed inability fairly and adequately to represent the class within the meaning of Rule 23. This crucial and commendable admission by the Commission renders it impossible for the Commission, compatibly with the due process clause of the Constitution, to bind the class. Hansberry v. Lee, supra.

Of course, this circumstance by no means deprives Section 706 actions by the Commission of their utility. On the contrary, such actions are an extremely useful and efficacious device that most aptly reconciles the public interest in eradicating discrimination with the private interests of individual employees in obtaining the benefits that are their due.

It will normally be the Commission that pursues both the public interest and the interests of individual employees by bringing a Section 706 or 707 action. Once the Commission has brought



such an action, persons aggrieved may intervene (Section 706(f)(1), 42 U.S.C. § 2000e-5 (f)(1) (1976)), but may not bring their own action. Of course, when individuals intervene, they will be bound by the judgment. Affected employees who do not intervene may still accept the judgment and back pay awarded and waive the rights they may have. And when they do so, the employer is bound by the judgment to pay them their due under it. This is likely to occur in the vast majority of cases.

However, if the members of the class do not accept the judgment, they may pursue their rights in private actions. Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304 (9th Cir. 1977); United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). See also Cox v. Allied Chemical Corp., 538 F.2d 1094, 1097-98 (5th Cir. 1976), cert. denied, 434 U.S. 1051 (1978); Watkins v. Scott Paper Co., 530 F.2d 1159, 1172-73 (5th Cir. 1976), cert. denied, 429 U.S. 861 (1976) (holding employees bound by a conciliation agreement negotiated by the EEOC only if they accepted benefits thereunder and knowingly waived

their individual rights). Even in such actions under Section 706, the judgment obtained by the EEOC will provide the individual employees with a substantial benefit. For in such actions they may plead the judgment obtained by the EEOC, insofar as that judgment found the employer liable for forbidden discrimination in employment, as preclusive on that issue. This offensive use of the doctrine of collateral estoppel is appropriate under the holding in Parklane Hoisery Co. v. Shore, 439 U.S. 322 (1979), and it gives maximum effect to the judgment obtained by the EEOC, furthering the policy of effectively combating discrimination in employment.

The type of action which Section 706 authorizes the Commission to bring is therefore a most felicitously constructed procedural institution, which does exactly what the legislature wanted it to do. It permits the EEOC to proceed against prohibited employment practices, both on behalf of the common weal and on behalf of individual employees, by seeking relief that is as effective as it possibly can be without unconstitutionally depriving individual employees of rights they might wish to assert individually.



This type of action by a federal agency on behalf of a class is so ideally suited for its purposes that Congress has used it often. A number of statutes give such agencies the right to seek judicial relief, including pecuniary relief, on behalf of individual claimants. Indeed, the National Labor Relations Act gives the NLRB the right to seek judicial enforcement of an order directing an employer "to take such affirmative action including ... back pay" as may be appropriate. NLRA § 10(c), (e), 29 U.S.C. § 160(c), (e) (1976). Most significantly, it does so by using the same language that appears in Section 706(g) of Title VII. No one, of course, has ever thought of seeking to compel the NLRB to comply with Rule 23 when it seeks relief on behalf of individual employees.[4/] The use of the same

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4/ The Equal Employment Advisory Council states in its amicus brief (p. 12, n.19) that Rule 81, Fed. R. Civ. P., expressly exempts proceedings to enforce orders of the NLRB, including back pay orders, from application of the Federal Rules of Civil Procedure. This simply is not true. Rule 81(a)(5) provides that "the practice in the district courts [in proceedings to enforce orders of the National Labor Relations Board] shall conform to these rules so far as applicable." The only exception is that the Federal Rules shall not

language in Section 706 is clear evidence of the legislature's intention not to require compliance with Rule 23 when the Commission brings its similar action.

Use of this special type of action is also authorized by the Fair Labor Standards Act. Section 16(c) of this Act, 29 U.S.C. § 216(c) (1976), gives the Secretary of Labor the right to bring an action to recover unpaid minimum wages and unpaid overtime compensation on behalf of underpaid individual employees. No court has ever attempted to hold the Secretary of Labor to the requirements of Rule 23 when he proceeds under this section.

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4/ cont'd.

alter the practice prescribed in 29 U.S.C. §§ 159 and 160 for beginning and conducting proceedings to enforce orders of the NLRB. However, these sections contain no reference to such proceedings as class actions, and they regulate only how such actions are to be brought (by petition) and how the transcript of proceedings before the NLRB is to be provided. What, significantly, § 159 of 29 U.S.C. does provide is that proceedings before the NLRB are also to be conducted in accordance with the Federal Rules of Civil Procedure. Accordingly, the analogy of the right of action of the EEOC with that of the NLRB is



One may well ask why so sustained an attempt is made to superimpose the wholly inappropriate requirements of Rule 23 upon Section 706 actions, while no such effort has been made in regard to similar actions under the National Labor Relations Act and Fair Labor Standards Act. The answer is apparent. The attempt to burden Section 706 actions with Rule 23 requirements is only another device in the fight to blunt the weapons which Congres has provided for combating discrimination.

As demonstrated, application of Rule 23 to EEOC actions under Section 706 would confront the courts with impossible tasks. If it would not preclude such actions altogether, it would provide an employer with the opportunity to raise a whole series of procedural obstacles. And, most significantly, if the district courts were to decide in favor of the employer on any of these issues so as to preclude the Commission from

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4/ cont'd.

particularly apposite. The NLRB has never been required to comply with Rule 23, even though Rule 81(a)(5) explicitly declares the Rules applicable. A fortiori, the EEOC should not be required to comply with Rule 23.

proceeding with the class aspects of the action, no interlocutory appeal would normally lie.[5/]

In an effort to add substance to their arguments, defendants have asserted that they would be seriously disadvantaged by the absence of the protections afforded by Rule 23. Their arguments are without merit.

First, defendants have argued that they would be better protected against further litigation by a judgment binding upon the members of the class. The argument disregards that the Commission cannot constitutionally represent a class of employees so as to bind all its members. Significantly, defendants fail even to mention this important constitutional obstacle.

Second, the defendants have argued that discovery would be unduly broad, unless the Commission were forced to comply with Rule 23.

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5/ In Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), this Court held that the "death knell" doctrine could not serve as the premise for appealing interlocutory orders of this nature. In the absence of a double certification under 28 U.S.C § 1292(b) (1976), the Commission would be effectively prevented from proceeding in the manner authorized by the legislature.



This argument appears to assume that the plaintiff in a Rule 23 class action must identify the members of the class and the alleged discriminatory practices with greater particularity than in a Section 706 action. Since the assumption is unwarranted,[6/] the argument is as well.

Third, the defendants argue that in Section 706 actions, as distinguished from Rule 23 actions, the Commission could somehow recover back pay without proving the entitlement to it. This assumption is again unwarranted and so therefore is the argument for which it is the basis.

Defendants finally appear to suggest that it is somehow unfair to hold them bound to a judgment in a Section 706 action, while the individual employees who have not intervened are not bound. Apparently, the defendants wish to resurrect the dead doctrine of mutuality. There is, of course, nothing unfair about holding defendants bound by a judgment rendered in an action in which they had

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6/ Indeed, the Advisory Committee specifically stated that Rule 23(b)(2) is intended as a vehicle for class actions "in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Advisory Committee Notes re Proposed Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 102 (1965).

every opportunity to defend themselves. See Parklane Hoisery Co. v. Shore, supra. That, we submit, is exactly what the Congress wanted when it gave the Commission the right to sue on behalf of affected employees. That, we further submit, is exactly what is needed if discrimination in employment is to be effectively combated.

In any event, the ability of individual employees to invoke as collateral estoppel a judgment against an employer in a Section 706 action in no way depends on the action's having been brought as a class action. Offensive use of the doctrine of collateral estoppel may be made irrespective of whether the Commission's action may be characterized as any kind of class action. Moreover if the Commission is recognized as being authorized to bring an action and to seek back pay on behalf of a class, there is a greater likelihood that futher litigation by individual employees will be avoided, inasmuch as employees can be bound by accepting the judgment and waiving their rights; otherwise, further individual litigation premised on the prior finding of liability will be necessary. Consequently, recognizing that the EEOC can properly maintain



an action seeking class relief under Section 706 would only serve the defendants' stated goal of obtaining a judgment that will, to the furthest extent possible, avoid further litigation.

## Conclusion

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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# Supreme Court of the United States

OCTOBER TERM, 1979

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**No. 79-488**

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GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., *et al.*,
*Petitioners,*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-488

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GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., *et al.*,
*Petitioners,*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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### INTEREST OF THE *AMICUS CURIAE*

This brief of the Equal Employment Advisory Council ("EEAC") as *amicus curiae* in support of petitioners is submitted with the written consent of all parties.[1] EEAC is a voluntary, nonprofit association organized as a corporation under the laws of the District of Columbia.

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[1] Their consents have been filed with the Clerk of the Court.

EEAC was founded to represent and promote the common interest of employers and the general public in developing and implementing sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers as well as trade and industry associations whose employer-members have a common interest in the foregoing purposes. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique competence and understanding of the practical and legal aspects of equal employment opportunity policies.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, Section 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981, and various other federal orders and regulations pertaining to nondiscriminatory employment practices. As such, they have a direct interest in the issue presented by the instant case, *i.e.*, whether the certification procedures of FED. R. CIV. P. 23 apply to a civil action filed by the EEOC under Section 706 of Title VII seeking class relief. Because of this interest, EEAC has been permitted to participate as *amicus curiae* in the court below and in other courts of appeals involving the same or similar issues. *See EEOC* v. *D. H. Holmes Co.*, 556 F.2d 787 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978); *EEOC* v. *Datapoint Corp.*, 570 F.2d 1264 (5th Cir. 1978). The EEAC has also filed briefs as *amicus curiae* in cases in this Court involving important equal opportunity issues. *See, e.g., Great American Federal Savings & Loan Association* v. *Novotny*, 442 U.S. 366 (1979); *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979); *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978); *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977).



## FACTS AND DECISION BELOW

The proceedings below arose out of a suit filed in the United States District Court for the Western District of Washington by the EEOC pursuant to Section 706 of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5. In its amended complaint, the EEOC alleged that defendants, General Telephone, one of its subsidiaries, and a local union of the International Brotherhood of Electrical Workers, had discriminated against women employees. The complaint sought, *inter alia*, a permanent injunction and an order requiring the defendants to provide back pay to a class of individuals allegedly affected by the challenged practices. Pet. App. A7.[2] The EEOC identified the class as " 'all female employees, female applicants for employment and women who would have applied but for the alleged unlawful discrimination.' " Pet. App. A7 n.1. Defendants moved to dismiss the class action aspects of the complaint on the grounds that the EEOC failed to comply with Rule 23 of the Federal Rules of Civil Procedure and the district court's Local Rule 23.[3] Pet. App. A26.

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[2] "Pet. App." refers to the appendix of the Petition for Certiorari filed in this case.

[3] FED. R. CIV. P. 23 permits the consolidation of a large number of individual claims in a single lawsuit. It sets forth procedures to determine the adequacy of the class representative and the appropriateness of maintaining the suit as a class action. The principal effect of applying Rule 23 to Section 706 suits brought by the EEOC is to assure finality to a litigated judgment, thereby avoiding a multiplicity of suits involving the same claim of discrimination and the same defendant. Local Rule 23 of the Western District of Washington prescribes the procedural steps for securing district court certification of the proposed class.

A United States Magistrate, acting as a Special Master, determined in a Report and Recommendation, later adopted by the district court, that the EEOC could proceed with the class action aspects without satisfying the requirements of Rule 23, and denied the motion to dismiss. Pet. App. A25-A32.[4] The district court expressly declined to follow the Fifth Circuit's contrary decision in *EEOC* v. *D. H. Holmes Co.*, 556 F.2d 787 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978). Pet. App. A26, A32.

On June 27, 1979, the Court of Appeals for the Ninth Circuit, affirmed the order in an opinion written by Senior District Judge Jameson.[5] The court recognized that by virtue of the 1972 amendments to Title VII, Congress had authorized the EEOC to file class action suits seeking to redress the grievances of others, but concluded that Congress had failed to specify whether such EEOC class action suits are subject to the certification requirement of Rule 23. Pet. App. A8-A16. The court also concluded that application of Rule 23 to individual Section 706 class suits does not mandate EEOC compliance with Rule 23 because of a dichotomy that the court perceived between EEOC's litigation role under Section 706, which is to vindicate the public interest, and that of private plaintiffs who seek to redress their private injury. Pet. App. A16-A18. The court examined the principal Rule 23 prerequisites for class certification to determine whether EEOC could satisfy those requirements consistent with its statutory mandate under Section 706, and concluded that the EEOC would have no difficulty qualifying under the membership and adequacy of representation requirements of Rule 23(a), by virtue of the congressional determination that "the EEOC is a 'properly suing party' . . . [and]

[4] The district court's opinion is reported at 16 FEP Cas. 476 (W.D. Wash. 1977).

[5] The opinion is reported at 599 F.2d 322 (9th Cir. 1979).



an adequate representative of victims of employment discrimination." Pet. App. A11-A12, A21. The court, however, perceived an obstacle to qualification under the typicality of claims or defenses requirement because of the dichotomy of interests it believed existed between the interests of private individuals and the EEOC's public interest duty under Section 706. Pet. A12. Nonetheless, in an about-face, the court held that the EEOC satisfies the Rule 23(a) certification requirements. Pet. App. A21.

Despite this conclusion, the court still refused to apply Rule 23 to EEOC suits under Section 706. First it compared the EEOC suits authorized by Sections 706 and 707, and found little practical difference between the two actions. Since Rule 23 had not been made applicable to Section 707 pattern or practice cases, the court could find no reason to distinguish between the two types of actions insofar as the applicability of Rule 23 was concerned. Pet. App. A18-A21. Second, the court was concerned that the class certification process would be "time consuming and costly," and "serve no useful purpose in the final disposition of the case." Pet. App. A23. Finally, although acknowledging the necessity of providing Title VII litigants the procedural safeguards embodied in Rule 23, the court believed that the authority of district courts under Section 706(g), 42 U.S.C. § 2000e-5(g), to fashion broad, equitable, substantive relief also permits trial judges to adopt Rule 23's procedural safeguards without actually certifying the case under that rule. Pet. App. A21-A23.

The Ninth Circuit's decision in this case conflicts with the Fifth Circuit's holding in *Holmes* that Rule 23 applies to EEOC suits for class relief under Section 706. *See also EEOC* v. *Datapoint Corp.*, *supra*, 570 F.2d at 1268. The district courts are also in conflict over this issue.[6] Not unexpectedly, this spreading conflict

[6] Cases holding Rule 23 applicable to EEOC suits include: EEOC v. Westinghouse Electric Corp., 81 F.R.D. 528, 529 (M.D.N.C.

in the courts has spawned a similar debate among commentators.[7]

## SUMMARY OF ARGUMENT

### I.

The 1972 amendments to Title VII of the Civil Rights Act of 1964 made two major changes respecting judicial enforcement of the statute, one of which is directly relevant to the instant case. In the relevant change, an amendment to Section 706, Congress granted authority

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1979); EEOC v. Delaware Trust Co., 81 F.R.D. 448 (D. Del. 1979); EEOC v. Page Eng'r Co., 17 FEP Cas. 1638 (N.D. Ill. 1978); EEOC v. Continental Oil Co., 13 FEP Cas. 785 (D. Colo. 1975), *aff'd on other grounds*, 548 F.2d 884 (10th Cir. 1977).

Decisions holding to the contrary include: EEOC v. Federal Reserve Bank, 21 FEP Cas. 742 (W.D. Tenn. 1979); EEOC v. Bumble Bee Seafoods Co., 19 EPD ¶ 9160 (D. Ore. 1979); EEOC v. Mid-City Care Center, 20 EPD (CCH) ¶ 30,275 (W.D. Tenn. 1979); EEOC v. Stroh Brewery Co., 83 F.R.D. 17 (E.D. Mich. 1979); EEOC v. Singer Controls Co. of America, 80 F.R.D. 76 (N.D. Ohio 1978); EEOC v. Raymond Metal Prod. Co., 17 FEP Cas. 206 (D. Md. 1978); EEOC v. Schlueter Mfg. Co., 17 FEP Cas. 53 (E.D. Mo. 1978); EEOC v. Whirlpool Corp., 80 F.R.D. 10 (N.D. Ind. 1978); EEOC v. Pinkerton's, Inc., 14 FEP Cas. 1431 (W.D. Pa. 1977); EEOC v. Vinnell-Dravo-Lockheed-Mannix, 417 F. Supp. 575, 577 (E.D. Wash. 1976); EEOC v. CTS of Asheville, Inc., 13 FEP Cas. 852 (W.D.N.C. 1976); EEOC v. Rexene Polymers Co., 10 FEP Cas. 61 (W.D. Tex. 1975); Stuart v. Hewlett-Packard Co., 66 F.R.D. 73 (E.D. Mich. 1975); EEOC v. Lutheran Hosp., 10 FEP Cas. 1177 (E.D. Mo. 1974); and EEOC v. Mobil Oil Corp, 362 F. Supp 786, 792 (W.D. Mo. 1973).

[7] Two commentators have supported the position that Rule 23 applies to EEOC suits. *See* Comment, *Certification of Class Suits Under Rule 23*, 46 U. CHI. L. REV. 690 (1979) (hereinafter "Comment"); Bumpass, *The Application of Rule 23 of the Federal Rules of Civil Procedure to Actions Brought by the Equal Employment Opportunity Commission*, 29 CASE W. RES. L. REV. 343 (1979) (hereinafter "Bumpass"). One commentator has taken the opposite view. *See* Reiter, *The Applicability of Rule 23 to EEOC Suits: An Examination of EEOC v. D.H. Holmes Co.*, 28 SYRACUSE L. REV. 741 (1977).



to the EEOC to institute suits in federal district court based upon a charge filed with the Commission by an individual alleging a violation of the Act.[8] The second major change, not directly relevant here, was an amendment to Section 707 whereby Congress transferred to the EEOC from the Attorney General authority to institute pattern or practice suits in the federal courts.[9]

Prior to the amendments, only an individual charging that he or she had been injured by a violation of the Act was permitted to initiate a Section 706 suit. The courts had determined that such actions, although grounded in an individual charge, could qualify for class treatment, provided that the provisions of Rule 23 of the Federal Rules of Civil Procedure were satisfied.

The authority granted by the 1972 amendments to the EEOC to sue on behalf of aggrieved individuals does not otherwise alter the nature of a Section 706 suit. There is no basis—either in the statutory language, legislative history, or considerations of policy—for construing the 1972 amendments as creating two different procedures in Section 706 cases—one applicable to suits brought by private litigants, the other applicable to cases brought by the EEOC on behalf of aggrieved private individuals—when the scope of available remedies and the standards of proof and liability are the same regardless of the plaintiff's identity. The legislative history of the amendments, in fact, provides affirmative support for the position that EEOC class-wide suits, like identical private suits, are subject to the procedural requirements of Rule 23.

### II.

Application of Rule 23 to suits brought by the EEOC in no way impairs the ability of the agency to carry out

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[8] § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

[9] § 707(a), 42 U.S.C. § 2000e-6(a).

its enforcement responsibility. The rule simply provides a procedural framework for discharging that responsibility and assuring fairness to all parties, including the individuals for whose benefit the EEOC has filed suit.

The purposes served by Rule 23 apply uniformly to all Section 706 class actions, regardless of the identity of the representative plaintiff. Rule 23 aids in early definition of the class, thereby permitting aggrieved individuals to determine whether their interests are being represented by the named plaintiff. It also provides notice to defendants of the scope of the charges against them. The rule provides for increased judicial control of the litigation to assure that the interests of absent class members are adequately protected, particularly if the litigation is to be settled. And lastly, the rule advances the congressional interest in finality of proceedings and avoidance of duplicative litigation, a major concern under Section 706 because of the existence of parallel EEOC and private litigation remedies. These interests are no less important when the EEOC brings a class action under Section 706 than when a private plaintiff initiates the identical suit under the same statute.

## ARGUMENT

### I. THE 1972 AMENDMENTS TO SECTION 706 OF THE CIVIL RIGHTS ACT OF 1964 AUTHORIZE THE EEOC TO SEEK CLASS-WIDE RELIEF AGAINST EMPLOYMENT DISCRIMINATION IN ACCORDANCE WITH THE SAME PROCEDURES APPLICABLE TO IDENTICAL PRIVATE SUITS

#### A. Congress Did Not Change The Scope Of Section 706 Actions When It Authorized The EEOC To File Civil Actions Under That Section

The class action procedures of Rule 23 apply when a private party claimant brings a class suit under Section 706 of the Civil Rights Act of 1964, *as amended*, 42



U.S.C. § 2000e-5, for redress of unlawful employment discrimination. The question is whether these Rule 23 procedures do not apply whenever, and merely because, the class suit is brought by the EEOC.

Before 1972, only an aggrieved private party had authority to institute such litigation,[10] and where the relief sought extended to a class against whom discrimination was directed, the class action procedures of Rule 23 applied.[11] The government's litigation role during this period was limited to suits challenging a "pattern or practice" of discrimination, which only the Attorney General (pursuant to Section 707 of the Act) could file.[12] The EEOC's enforcement authority was restricted to seeking voluntary compliance through "informal methods of conference, conciliation and persuasion." [13] Originally, in 1964, Congress expected that the majority of discrimination cases would be resolved outside of court,[14] but where litigation became necessary, two wholly different remedies were provided—the public's broad interest in combatting patterns of discriminatory conduct was assigned by Section 707 to the Attorney General for enforcement, while

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[10] *See, e.g.*, Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 359 (1977).

[11] *See, e.g.*, Gregory v. Litton Sys., Inc., 472 F.2d 631, 633 (9th Cir. 1972); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1123-25 (5th Cir. 1969); Jenkins v. United Gas Corp., 400 F.2d 28, 33-35 (5th Cir. 1968). *See generally Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1219 (1971).

[12] Section 707 contained no provision for a private right of action.

[13] Civil Rights Act of 1964, § 706(a), Pub. L. No. 88-352, 78 Stat. 259 (1964); *see* SENATE COMM. ON LABOR & PUBLIC WELFARE, 92d CONG., 2d SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 413 (1972) (hereinafter "LEGISLATIVE HISTORY").

[14] *Id.* at 414.

Section 706(f)(1) granted the private victim of discrimination remedies to redress individual and class discrimination.

The primary purpose of the 1972 amendments was to grant some form of enforcement authority to EEOC to increase the effectiveness of its conciliation process.[15] Although alternative methods of enforcement were actively considered,[16] the amendments, as finally adopted by Congress, did not change the fundamental nature of the two different judicial remedies created by Sections 706 and 707; rather they gave to the EEOC standing to initiate actions under Section 706 to redress discrimination by non-government employers against private victims, and substituted the EEOC for the Attorney General in Section 707 pattern or practice actions. Sections 706 & 707, 42 U.S.C. §§ 2000e-5, 2000e-6. By so doing, Congress in no way changed the essential character and purpose of Section 706, *i.e.*, to redress private discriminations. The amendments left intact the basic nature of a Section 706 suit, whether the plaintiff be a private individual or the EEOC suing as representative and on behalf of private individuals. In either event, a suit under Section 706 is the vehicle by which Congress sought to implement the goal at the heart of Title VII, "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). *See Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 763-64 (1976).

The court below held that, when the EEOC brings a Section 706 action seeking class relief, it need not comply with the requirements of Rule 23 even though the remedies sought are identical to those available to a private party plaintiff in an identical class action suit. The

[15] *See, e.g., id.* at 63-64, 413-14.

[16] *See* note 20 *infra*.



decision rests on an incorrect construction of Title VII, supported neither by the language nor the legislative history of the 1972 amendments, and is reminiscent of the long-discredited notion that government agencies are not subject to the same procedural rules that apply to other litigants.[17]

Consider first the statutory language. In the 1972 amendments, Congress first added an introductory subsection to Section 706 declaring that the EEOC "is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice." Section 706(a), 42 U.S.C. § 2000e-5(a). It then amended relettered subsection (f) to provide that, if the Commission cannot secure a satisfactory conciliation agreement through its internal procedures, "the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision . . . ." Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1). It went on to make certain changes in procedures before the EEOC. Sections 706(b) and (e), 42 U.S.C. §§ 2000e-5(b) & (e). Before the 1972 amendments, only a private and injured party could bring such a civil action. *See* note 10 *supra* and accompanying text.

Implicit in the 1972 amendments is the premise of the general applicability of the Federal Rules of Civil Procedure, and conspicuous by its absence is any evidence whatsoever that Congress intended to alter the procedural requirements otherwise applicable to Section 706 civil actions in federal district courts.[18] Rule 1 of the Federal

[17] *See* United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958); 4 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1027, at 118-19 (1969); Holtzoff, *Procedural Rules When Government Is a Litigant*, 26 A.B.A.J. 391 (1940); Comment, *supra* note 7, 46 U. CHI. L. REV. at 699 n.63.

[18] Although the statutory language contains no express requirement that EEOC comply with Rule 23, it is apparent that Congress assumed the general applicability of the Federal Rules, *see* note 21,

Rules of Civil Procedure, which declares them applicable "in all suits of a civil nature," refers to Rule 81 for a list of exceptions, and EEOC actions under Section 706 are not included in the long list of exceptions.[19] The importance and weight of the procedural requirements embodied in the Federal Rules are reflected in the precise and complex manner Congress deliberately chose for promulgating and amending those Rules. *See* 28 U.S.C. § 2072. A departure from the Rules, especially one completely abrogating an entire rule for an entire class of lawsuits, is not lightly to be inferred from an Act of Congress that does not explicitly amend the Federal Rules or, indeed, even mention Rule 23.

Just as the language of the 1972 amendments to Section 706 does not justify the view that Rule 23 has been abrogated for Section 706 actions brought by the EEOC, so too the legislative history provides not even a prop

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*infra*, and only made explicit reference to specific rules when the statutory language appeared to render a rule inapposite. Section 706(f)(2), 42 U.S.C. § 2000e-5(f)(2), is an example of a provision added to Title VII by the 1972 amendments where it was necessary to refer to a particular Federal Rule that otherwise would not have been applicable. This section permits the EEOC to file an action in district court for "temporary or preliminary relief," not as an initial step in a suit ultimately seeking a permanent injunction, but to aid the agency in discharging its role as conciliator. *See* EEOC v. Pacific Press Publishing Ass'n, 535 F.2d 1182, 1185 (9th Cir. 1976). Without a specific reference, Rule 65, which is directed to *interlocutory* preliminary injunctions and temporary restraining orders, would have been inapplicable to actions under Section 706 (f)(2) where "temporary or preliminary relief" constitutes a *final judgment*. Furthermore, the rule may otherwise also have been inapplicable to Section 706(f)(2) suits because, by its terms, it does not apply where it would modify a federal statute "relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee." FED. R. CIV. P. 65(e).

[19] In contrast to the omission of EEOC Section 706 suits, Rule 81 expressly exempts proceedings to enforce orders of the National Labor Relations Board, including back pay orders. *See* FED. R. CIV. P. 81(a)(5); EEOC v. D. H. Holmes Co., *supra*, 556 F.2d at 795.



for the decision below. On the contrary, the legislative history confirms that Congress intended full application of the Federal Rules to EEOC actions under Section 706 and, more specifically, that Congress understood the class action nature of Section 706 actions when it granted the EEOC standing to bring such actions, and assumed that Rule 23 would apply whether the suit was brought by private individuals or by the EEOC in its own name on their behalf.

Indeed, the Senate and House floor debates[20] indicate that one principal reason Congress chose to strengthen the EEOC's hand by permitting it to file court suits rather than issuing cease and desist orders was a strong desire, clearly expressed again and again throughout the debates,[21]

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[20] The Congressional purpose behind the enforcement provisions of the 1972 amendments must be derived from the floor debates rather than from committee reports because in both the House and the Senate, the bills reported out of Committee providing for EEOC cease and desist authority were rejected on the floor after lengthy debate and replaced by language authorizing the EEOC to file suit in Federal District Court. *See* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 361-64 (1977). Thus, the Committee Reports discuss only the rejected cease and desist provisions and the Conference Report merely states that both the House and Senate authorized EEOC to bring civil actions. *See* LEGISLATIVE HISTORY at 68-71, 426-431, 1815.

[21] *See, e.g.*, LEGISLATIVE HISTORY at 201 (Statement of Rep. Quie: "[T]he procedural . . . safeguards for all the parties involved would be far more adequately assured under the direct court approach"); *id.* at 221 (Statement of Rep. Railsback expressing concern that "the procedural rules governing administrative hearings are virtually nonexistent"); *id.* at 226 (Statement of Rep. Mazzoli, co-sponsor of amendments ultimately adopted in the House, referring to the Committee Report statement that "[a]dministrative tribunals are better suited to rapid resolution . . . [because they] are less subject to technical rules," wherein the Congressman stated, "I am wondering if perhaps in trying to avoid overburdening the Federal Court system, we will overburden alleged defendants"); *id.* at 278 (Statement of Rep. Mazzoli emphasizing the importance of "granting each party his day in court and the fullest protection of all rules, procedural and evidentiary"); *id.* at 807 (Statement of Sen. Allen arguing in favor of court enforcement so that defendants have the protections

to assure all parties the procedural protections of the Federal Rules of Civil Procedure and the traditional judicial rules of evidence. It therefore was no more necessary for Congress to specify Rule 23 in a statute authorizing the EEOC to file class action suits than it was to specify Rule 8 because such suits are commenced by the filing of a complaint or Rule 26 because the EEOC would be subject to discovery. It is quite common that the obvious does not have to be spelled out; no significance can attach to the fact that Congress saw no need to do so in this statute.

More specifically, Senator Javits, a floor manager of the 1972 legislation and the ranking minority member of the Committee that reported it, pointed out to the Senate that it was by virtue of Rule 23 that EEOC would have authority to secure class relief when suing under Section 706. Thus, during debate on a proposed amendment to Section 707, Senator Javits, referring to the Senate's vote of the previous day to authorize EEOC suits under Section 706, explained that if EEOC "can sue for an individual claimant, then . . . [it] can sue for a group of claimants," since "this is provided for by the rules of civil procedures in the Federal courts." [22] Senator Javits went on to state:

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"of the customary and time-honored rules of evidence and procedure"); *id.* at 1003 (Statement of Sen. Ervin asserting that the court enforcement amendment "affords an adequate procedure by which the EEOC . . . can have a right of vindication in the court according to the established rules of procedure and the established rules of evidence"); *id.* at 1429 (Statement of Sen. Javits: "The last item, which I think bears repetition . . . is that . . . [u]nder our [court enforcement] amendment, not only the rules of evidence, but the rules of civil procedure . . . will be applicable"); *id.* at 1485 (Statement of Sen. Dominick: "[Y]ou can do far better in a court proceeding which is impartial, organized, and ruled by precedent and established rules of procedure than you can from an administrative proceeding").

[22] *Id.* at 1589.



> I have referred to the rules of civil procedure. I now refer specifically to rule 23 of those rules, which is entitled "Class Actions" and which give[s] the opportunity to engage in the Federal court in class actions by properly suing parties. We ourselves have given permission to the EEOC to be a properly suing party.[23]

Senator Williams, the Committee Chairman and floor manager of the bill, also demonstrated his awareness that Title VII litigation generally takes the form of class actions and sought to assure that the availability of such actions and the procedural rules governing them would not be disturbed by authorizing the EEOC to bring such actions. Thus, Senator Williams stated in a section-by-section analysis:

> In establishing the enforcement provisions under this subsection [706(f)(1)] and subsection 706(f) generally, it is not intended that any of the provisions contained therein are designed to affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. . . . [T]he leading cases in this area to date have recognized that Title VII claims are necessarily class action complaints . . . .[24]

There is nothing in the Senator's statement that even intimates that EEOC class actions are to be treated differently from private class actions from the standpoint of Rule 23.

Plainly, these statements by the leading members of Congress responsible for the 1972 amendments squarely contradict the conclusion below that Congress did not

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[23] *Id.* at 1590. The import of Senator Javits' remarks is analyzed in detail in Bumpass, *supra* note 7, 29 CASE W. RES. L. REV. at 354-57.

[24] LEGISLATIVE HISTORY at 1773. *See id.* at 1847.

intend Rule 23 to apply to Section 706 actions brought by the EEOC.

### B. Congress Has Determined That The EEOC Is A Suitable Rule 23 Class Representative In Section 706 Actions

A major thrust in the EEOC's argument below and in other courts where the applicability of Rule 23 to EEOC suits has been raised is its claim that it is incapable of satisfying the Rule 23 prerequisites for class certification.

Rule 23(a) provides that a party may sue as a class representative if it is a member of the class and if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The court below seemed to agree with many of the EEOC's arguments that it was incapable of satisfying the Rule 23 requirements, although at another point in its opinion it reached the opposite conclusion. *Compare* Pet. App. A11-A12 *with id.* A21. A canvass of these requirements will reveal that the EEOC should have no difficulty qualifying for class certification.

#### 1. *Membership.*

It is generally true that the plaintiff in a class action must be a member of the class he seeks to represent. *See, e.g., East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 403 (1977), *quoting Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974). The courts have also recognized that an organization or association established to represent the interests of a class



may satisfy the membership requirement of Rule 23(a).[25] *See, e.g., Smith* v. *Board of Education*, 365 F.2d 770, 777-78 (8th Cir. 1966) (Blackmun, J.); *Undergraduate Student Association* v. *Peltason*, 359 F. Supp. 320, 323 (N.D. Ill. 1973) (three-judge court); *cf. Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 551 n.2 (1973). *See also Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 937-38 (2d Cir. 1968); 3B MOORE'S FEDERAL PRACTICE, ¶ 23.04[3], at 23-142 to 23-146 (2d ed. 1979). These cases, as Judge (now Mr. Justice) Blackmun has pointed out, turn on whether the organizational plaintiff has standing to bring the action as "a real party in interest." *Smith* v. *Board of Education, supra*, 365 F.2d at 777; *see* 7 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1761, at 591-92 (1972). There is no longer any doubt that an organizational plaintiff has standing to sue in a representative capacity on behalf of its members. *See, e.g., Warth* v. *Seldin*, 422 U.S. 490, 511, 515 (1975); *National Motor Freight Traffic Association* v. *United States*, 372 U.S. 246, 247 (1963) (*per curiam*).

Although, to be sure, the EEOC is not a voluntary membership association and has suffered no injury to itself, this has not been a barrier to establishing the standing of a public agency to sue in a representational capacity on behalf of a class where the agency's purpose is to

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[25] As one commentator recently noted:

> Rule 23 class actions have, for example, been brought by associations, unions, the next friend of a minor, trustees, executors, and bankruptcy trustees. State attorneys general, with the requisite standing under local law, have been allowed to represent rule 23 classes in federal courts in cases in which the state is not technically a member of the class—for example, in cases in which the class is the school districts in the state.

Comment, *supra* note 7, 46 U. CHI. L. REV. at 711-12 (footnotes omitted).

represent the interests of that class.[26] *See Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 343-45 (1977). In the context of Section 706 litigation, Congress has defined the EEOC's mission as seeking redress for victims of unlawful employment discrimination.[27] The Fifth Circuit was therefore correct in stating:

> To hold that EEOC is not a "member of the class" as that term is used in Rule 23 would be contrary to Congress' purpose. Especially when EEOC seeks to recover back pay for individuals, it would seem to be Congress' clear intent that EEOC stand in the shoes of those individuals and represent them in a suit the individuals would otherwise be entitled to bring. Where individuals can institute Title VII suits under Rule 23, it would be anomalous in the extreme to hold that EEOC, an enforcement agency expressly authorized by Congress to sue, may never do so under Rule 23 solely because it runs afoul of the membership requirement.

*EEOC* v. *D.H. Holmes Co.*, *supra*, 556 F.2d at 796-97 (footnotes omitted).[28]

**2. *Adequacy of Representation and Typicality.***

The Court of Appeals in this case was also incorrect, in our view, in finding a conflict between the representational duties of a class action plaintiff under Rule 23

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[26] Governmental entities, as such, are not *per se* ineligible to bring class actions. *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 266 (1972); Illinois v. Bristol-Myers Co., 470 F.2d 1276, 1277-78 (D.C. Cir. 1972).

[27] LEGISLATIVE HISTORY at 1589.

[28] The Ninth Circuit also concluded that the EEOC satisfied the membership requirement of Rule 23(a) by virtue of Congress' decision to grant the EEOC standing to assert the rights of others. Pet. App. A21.



and the EEOC's statutory role under Title VII as "a public agency 'charged with the vindication of public policy, not merely with the enforcement of private rights.'" Pet. App. A16-A18. The court believed that when Congress authorized the EEOC, as well as private individuals, to bring suits under Section 706, Congress had created a dichotomy of roles in which the government protects solely the public interest and the individual plaintiff pursues strictly his private interest. The EEOC urged below and in other courts that this dichotomy precluded it from adequately representing the interests of a class of private individuals.

But all suits under Title VII "'involve the vindication of a major public interest.'"[29] Even a private action under Section 706 vindicates that public interest by redressing the private injury to individual victims of discrimination.[30] When Congress amended Section 706 in 1972, it assigned to EEOC the major burden of such litigation in hopes of strengthening Title VII enforcement, not by creating a new remedy, but by authorizing suits to be brought by a more effective litigator using the existing remedy. In other words, Congress preserved the pre-existing Section 706 remedial mechanism which integrates both public and private interests, but established dual enforcement through government and private litigation. *See* text at 9-10 *supra*. *See also* Comment, *supra* note 7, 46 U. CHI. L. REV. at 705 n.91. The mechanism remained essentially the same; Congress merely provided a new trigger—the EEOC.

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[29] Franks v. Bowman Transp. Co., 424 U.S. 747, 778 n.40 (1976), *quoting* Section-By-Section analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972—Conference Report, 188 CONG. REC. 7166, 7168 (1972).

[30] Thus, in a section-by-section analysis of the 1972 amendments, Senator Williams, the floor manager of the bill, explained: "[T]he individual's rights to redress are paramount under the provisions of Title VII." LEGISLATIVE HISTORY at 1772.

The Ninth Circuit's attempt to find a dichotomy of roles between public and private Section 706 suits also overlooks the fact that the private litigant redresses more than his private interests when he sues under Title VII. As this Court has stated:

> In [private actions] . . ., the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.

*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). The role is akin to that of a "private attorney general who 'takes on the mantel [*sic*] of the sovereign.'" *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 715 (7th Cir. 1969), *quoting Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 32 (5th Cir. 1968). Thus, whether EEOC or a private litigant sues under Section 706, the nature of the suit is identical and the interests served are identical [31]—the public policy goals of Title VII are promoted by compensating individuals victimized by discrimination and by awarding injunctive relief to ensure against repetition of the same wrongs.

A number of lower courts have sought to separate private and public interests in construing various aspects of Title VII enforcement.[32] It may be significant, however,

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[31] This identity in the nature of the public and private action and the interests served contrasts with other legislative schemes, which involve dual public and private remedies, such as the Sherman Act, where the nature of the actions and the interests served are not identical. *See* United States v. Borden Co., 347 U.S. 514, 518-19 (1954).

[32] *See, e.g.*, Johnson v. Nekoosa-Edwards Paper Co., 558 F.2d 841, 846 (8th Cir.), *cert. denied*, 434 U.S. 920 (1977); EEOC v. Occidental Life Ins. Co., 535 F.2d 533, 537-40 (9th Cir. 1976), *aff'd on other grounds*, 432 U.S. 355 (1977); EEOC v. General Electric Co., 532 F.2d 359, 373 (4th Cir. 1976); EEOC v. E.I. duPont de Nemours & Co., 516 F.2d 1297, 1299-1300 (3d Cir. 1975); EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1359 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975). *Contra*, EEOC v. D.H. Holmes Co., 556 F.2d 787, 794 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978); EEOC v. Continental Oil Co., 548 F.2d 884, 887 (10th Cir. 1977).



that in the one case that reached this Court in which the lower court's judgment rested on such an argument, two Justices pointedly rejected the argument and the majority affirmed the judgment on an entirely different rationale. *Compare Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 358-73 (1977), *with id.* at 381-84 (Rehnquist, J., dissenting in part). The majority in *Occidental Life* correctly pointed to the EEOC's investigative and conciliation functions as indicating that the agency's mission goes beyond "conducting litigation on behalf of private parties." *Id.* at 368. But the majority expressed no opinion on the nature of the EEOC's role as litigator, and the dissent affirmatively declared that the EEOC's primary function as litigator under Section 706 is to seek redress for discrimination complaints on behalf of individuals that could have brought their own suits. *Id.* at 383.

In *UAW Local 283* v. *Scofield*, 382 U.S. 205, 217-22 (1965), the NLRB took a position similar to that of the EEOC and the Ninth Circuit in this case. The Board claimed to be the "custodian of the 'public interest,' to the exclusion of the so-called 'private interests' at stake." *Id.* at 218. *See* Comment, *supra* note 7, 46 U. CHI. L. REV. at 705 n.91. Unanimously rejecting the argument, this Court held that

> the statutory pattern of the Labor Act does not dichotomize "public" as opposed to "private" interests. Rather, the two interblend in the intricate statutory scheme.

*Id.* at 220.[33] *Cf. Garner* v. *Teamsters Local No. 776*, 346

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[33] The issue in *Scofield* involved the Labor Board's opposition to intervention of the charging party in judicial review of an unfair labor practice decision upholding the charge. Scofield, *supra*, 382 U.S. at 217.

U.S. 485, 492-501 (1953). The EEOC's claim that its duty is to further public policy goals and not to promote the rights of individual aggrieved parties is even weaker than that of the Labor Board, for unlike the Board which adjudicates unfair labor practice charges in an administrative proceeding, the EEOC was expressly denied such powers in the 1972 amendments and authorized, instead, to sue as an advocate of private litigants. *See Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 361-64.

There is no clash, we submit, between Rule 23 and the public goals of Title VII.[34] Rule 23 harmonizes well with the congressional purposes of Section 706.[35] In essence, Congress decided to assign the EEOC the task of repre-

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[34] The Ninth Circuit's perception of a dichotomy of roles between the EEOC and private claimants led it to conclude that the EEOC

> does not satisfy the requirement of Rule 23 (a)(3) that the "claims or defenses of the representative parties" be "typical of the claims or defenses of the class."

Pet. App. A11-A12. The same reasoning supported the court's rejection of the *Holmes* conclusion that EEOC must comply with Rule 23 because, when it sues, it stands in place of a private litigant who, had he sued on his own, would be subject to the rule. Pet. App. A17-A18. Since the court's premise is in error, its conclusion does not follow. Indeed, if the EEOC is to discharge its statutory mission of asserting the claims of aggrieved individuals, its claims not only will be typical of the claims of those individuals, they will be identical. *See Comment*, *supra* note 7, 46 U. CHI. L. REV. at 716 n.144; Bumpass, *supra* note 7, 29 CASE W. RES. L. REV. at 380-82; Harris v. Anaconda Aluminum Co., 17 FEP Cas. 181 (N.D. Ga. 1978).

[35] As noted below, *see* text at 31-32 *infra*, by recognizing that Rule 23 applies to all Section 706 class actions and not merely to those initiated by private individuals, the ability of federal district judges to protect the interests of class members and thereby further the public policy goals of Title VII will be enhanced by certifying these actions under the rule. *See* FED. R. CIV. P. 23(e); Comment, *supra* note 7, 46 U. CHI. L. REV. at 730-34; *cf.* Hutchings v. United States Industries, Inc., 428 F.2d 303, 310 (5th Cir. 1970).



senting private interests in order to further the public interest. EEOC's view that it is not an adequate representative of private interests would, if accepted by the courts, defeat the legislative purpose.

### 3. *Numerosity.*

Finally, Rule 23's numerosity requirement—the only other precondition for class certification that has given concern to a lower court—will have no impact on EEOC's ability to discharge its statutory mission. In *EEOC* v. *Whirlpool Corp.*, 80 F.R.D. 10, 19 (N.D. Ind. 1978), the court believed that the numerosity requirement might preclude the EEOC from seeking relief for small classes of employees. This concern, we submit, is unfounded.

Classes consisting of relatively few members have been certified.[36] Existing lower court precedent accordingly should cover the vast majority of cases which the EEOC may file. But even in the isolated case of a small class not covered by existing precedent, no aggrieved party will be denied the opportunity for judicial redress of his grievances. The determination of when a class is too numerous to make joinder impracticable is not based solely on numbers, but may also be determined by the nature of the action and the underlying congressional policy of the regulatory scheme.[37] Here, since Congress has determined that the litigation burden should fall primarily on the EEOC as a representative plaintiff and that private remedial efforts should be the exception,[38] we think Con-

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[36] *See* Bumpass, *supra* note 7, 29 CASE W. RES. L. REV. at 378-79 and cases cited at 379 nn.166 & 167.

[37] *See generally* 7 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1762, at 600-03 (1972).

[38] In a section-by-section analysis of the 1972 amendments, Senator Williams, the floor manager of the bill, explained:

[Footnote continued on page 24]

gress has made the legislative judgment that joinder, if not impracticable in a technical sense, certainly is undesirable from a policy standpoint. So long as the EEOC has reason to believe that the Act was violated and identifies on whose behalf it is suing, no further showing of numerosity would be needed for certification.

## II. EEOC COMPLIANCE WITH RULE 23 WILL PROTECT THE INTERESTS OF AGGRIEVED PARTIES AND DEFENDANTS WITHOUT UNDULY BURDENING EEOC'S ENFORCEMENT ACTIVITY

The court below expressed concern that application of the rule would be "time consuming and costly" and "would serve no useful purpose." Pet. App. A23. This view has no support either in experience or logic. The cases in which the district courts have applied Rule 23 to EEOC Section 706 suits demonstrate no time-consuming, costly, or other impediments to certifying the agency as a class representative.[39] Since the EEOC, before filing suit,

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[38] [Continued]

> In providing this remedy, it is intended that recourse to this form of remedy will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC.

LEGISLATIVE HISTORY at 1772.

[39] *See, e.g.*, EEOC v. Datapoint Corp., *supra*, 570 F.2d at 1268; Harris v. Anaconda Aluminum Co., 17 FEP Cas. 181, 182-85 (N.D. Ga. 1978); EEOC v. Delaware Trust Co., Civ. A. No. 75-157 (D. Del. Apr. 24, 1979) (order certifying EEOC as class representative). Two cases in which certification was denied over the EEOC's objection represent unusual circumstances unlikely to influence future cases. In EEOC v. Spector Freight Sys., Inc., 15 EPD (CCH) ¶ 7967 (N.D. Miss. 1977), the court declined to certify the EEOC as class representative *after trial* because there had been no showing that there were any aggrieved parties other than two individuals who were also named plaintiffs in the suit. *Id.* at 6811. EEOC v. Westinghouse Electric Corp., 81 F.R.D. 528 (M.D.N.C. 1979), turns on the court's conclusion that the EEOC made an insufficient showing that an across-the-board class of discrimination



must conduct an investigation of the charge and find reason to believe that Title VII has been violated, it should have no difficulty making the showing required for class certification, particularly in light of the firm congressional policy favoring EEOC class suits as the primary vehicle for redressing unlawful employment discrimination.[40]

Furthermore, far from serving "no useful purpose," one commentator has recently noted that "[r]ule 23 certification plays a central protective role in representative actions" in that it "provides a framework designed to ensure procedural fairness to both class members . . . and defendants." [41] It is both a necessary and an entirely reasonable measure for the orderly processing of Section 706 litigation.

### A. EEOC Compliance With Rule 23 Will Protect Defendants' Interests By Promoting Congress' Aim In Achieving Finality Of Litigation And Avoiding Unnecessary Duplication Of Proceedings

Class certification is required to assure that once the issues raised by the EEOC have been adjudicated, they will not be litigated again in suits by individual employees. Absent certification, aggrieved class members (other than the charging party) would not be bound by an EEOC action.[42] They would be free to await the outcome

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victims existed. The court pointed out that the EEOC did not even contest the defendant's principal evidence that refuted an inference of discrimination in hiring. *Id.* at 529-31.

[40] *See* note 47 *infra*.

[41] Comment, *supra* note 7, 46 U. CHI. L. REV. at 717-18.

[42] *See, e.g.*, United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 845 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); Rodriguez v. East Tex. Motor Freight, 505 F.2d 40, 65 (5th Cir. 1974), *vacated on other grounds*, 431 U.S. 395 (1977); Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1203-04 (2d Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

of the suit and eventually to initiate identical Section 706 litigation, but seeking greater relief than was awarded to the EEOC.[43] This would leave defendants open to "repeated lawsuits on the same essential subject matter," Advisory Comm. Note, 39 F.R.D. 69, 91 (1966), possibly leading to inconsistent adjudications.[44] The effect of permitting multiple litigation of the same discrimination charge would be to reward those who sat back with a second "bite of the apple" while penalizing the individual whose charge led to the EEOC action.

In contrast, application of Rule 23 to EEOC Section 706 class litigation generally will bind members of the

[43] *See* Zimmer & Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 DUKE L.J. 163, 207 n.136 (1976):

> [A]n EEOC acceptance of the settlement in its pattern or practice suit against the steel industry, if it is generally perceived to be inadequate, may trigger a number of private actions against different companies, plants, departments, or lines of progression. Although the Commission may have saved itself extensive resources, the consequences could be inefficient in terms of both private plaintiffs and the courts if a multiplicity of suits in different districts follows. There is good reason to believe that at least substantial dissatisfaction exists, although the extent to which it will be reflected in a multiplicity of private actions is unclear.

AT&T subsidiaries which were parties to an AT&T settlement, EEOC v. AT&T, Civ. No. 73-149 (E.D. Pa., filed Jan. 18, 1973), have nonetheless been subjected to subsequent lawsuits brought by individuals. *See, e.g.*, Walker v. Southwestern Bell Tel. Co., 18 FEP Cas. 1784 (N.D. Tex. 1978); Garnett v. Mountain States Tel. & Tel. Co., 18 FEP Cas. 1773 (D. Colo. 1977); Peals v. Southwestern Bell Tel. Co., 18 FEP Cas. 1781 (D. Kan. 1977); Butera v. Mountain States Tel. & Tel. Co., 18 FEP Cas. 1779 (D. Colo. 1977); LaCombe v. Mountain States Tel. & Tel. Co., 18 FEP Cas. 1774 (D. Colo. 1977).

[44] The *Holmes*, *Datapoint*, and *Delaware Trust* courts noted that Rule 23 was needed to protect the defendant from multiple lawsuits on the same claims. EEOC v. D. H. Holmes Co., *supra*, 556 F.2d at 795; EEOC v. Datapoint Corp., 570 F.2d 1264, 1268 (5th Cir. 1978); EEOC v. Delaware Trust Co., 81 F.R.D. 448, 452-53 (D. Del. 1979).



aggrieved class to the judgment in the EEOC suit,[45] thus resolving the claims of class member employees in one proceeding, without subjecting defendants—and courts—to the potential of future time-consuming, expensive litigation in numerous individual actions. *Cf. Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 715 (7th Cir. 1969). Rule 23 would thus perform the functions for which it was designed, including eliminating the possibility of inconsistent adjudications on the same facts and avoiding a "multiplicity of activity." *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 550-51 (1974). This result is consistent with Congress' goal, set forth in the 1972 amendments, of avoiding duplicative litigation of similar factual and legal issues and with the public policies embodied in Rule 23.[46]

The congressional decision to permit individuals as well as the EEOC to bring Section 706 actions was plainly not intended to permit multiple litigation of the same claims. Congress sought only to ensure that the courts would be available to adjudicate an individual's discrimination charge when the EEOC failed to initiate the litigation.[47] *See, e.g., Alexander* v. *Gardner-Denver*

[45] FED. R. CIV. P. 23(c)(3). *See* EEOC v. Datapoint Corp., *supra*, 570 F.2d at 1268. A carefully drawn Rule 23(c)(3) judgment will bind all class members provided their interests have been adequately represented and they have been accorded due process in the conduct of the litigation. *See* Hansberry v. Lee, 311 U.S. 32, 41-43 (1940); Advisory Comm. Note, 39 F.R.D. 69, 106 (1966); 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1789, at 175-84 (1972).

[46] The Federal Rules of Civil Procedure were amended in 1966 to prevent precisely the type of one-way class suits that the EEOC seeks to bring. *See* Advisory Comm. Note, 39 F.R.D. 69, 105-06 (1966).

[47] In a section-by-section analysis of the 1972 amendments, Senator Williams, the floor manager of the bill, explained:

> In providing this remedy, it is intended that recourse to this form of remedy will be the exception and not the rule, and that the vast majority of complaints will be handled through the

*Co.*, 415 U.S. 36, 44-45 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-99 (1973). Thus, Congress strictly limited the circumstances under which private parties are free to sue to the following: (1) when the EEOC has dismissed a charge, or (2) when no court action has been commenced by the EEOC and no conciliation agreement satisfactory to the complainant has been obtained within 180 days of the filing of the charge with the EEOC or within 60 days of the expiration of a referral of the charge to an appropriate state agency, whichever occurs later. Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

Once a private suit has been filed, most lower courts have held that the EEOC may not file a duplicate action but may proceed only by way of permissive intervention in the pending action, unless its allegations of discrimination are broader than those of the charging party. *See, e.g.*, *McClain* v. *Wagner Electric Corp.*, 550 F.2d 1115, 1119 & n.3 (8th Cir. 1977); *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1362-63 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975); *EEOC* v. *Huttig Sash & Door Co.*, 511 F.2d 453, 455 (5th Cir. 1975); *cf. EEOC* v. *Continental Oil Co.*, 548 F.2d 884, 888-90 (10th Cir. 1977). Moreover, a final adjudication of a private action bars

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offices of the EEOC. However, as the individual's rights to redress are paramount under the provisions of Title VII, it is necessary that all avenues of relief be left open for quick and effective relief.

In providing for the individual right to sue in the event that action by the Commission is unsatisfactory or unresponsive, it is not intended that duplication of proceedings should be allowed. Therefore, in any proceeding where the General Counsel or the Attorney General, as the case may be, is proceeding with due diligence within the time limits specified in this subsection, the person aggrieved would be precluded from instituting an individual action until such time as one of the specific conditions of this subsection are not met.

LEGISLATIVE HISTORY at 1772; *See* EEOC v. Missouri Pac. R.R., 493 F.2d 71, 73-75 (8th Cir. 1974).



relitigation of the same charge in a subsequent suit initiated by the EEOC (*EEOC* v. *Huttig Sash & Door Co.*, *supra*, 511 F.2d at 456), and if the EEOC commences an action under Section 706, the charging party is barred from commencing his own suit and is limited to intervention in the government action. *See McClain* v. *Wagner Electric Corp.*, *supra*, 550 F.2d at 1119; *EEOC* v. *Western Electric Corp.*, 382 F. Supp. 787, 793 (D. Md. 1974).

Thus, nothing in the Act contemplates the availability of a second forum to private individuals dissatisfied with the *judicial* outcome of a discrimination complaint. Congress permitted only one judicial action and that action was to provide a final adjudication and remedy of a particular charge of discrimination. No statutory purpose is served by the EEOC's resistance to a procedure that could bind class members, subject to the protections of Rule 23, to the same extent that the charging party is now bound by the outcome of an EEOC-initiated Section 706 suit or class members are now bound when the named class plaintiff is a private individual. *See Stevenson* v. *International Paper Co.*, 516 F.2d 103, 108-11 (5th Cir. 1975) (class action); *EEOC* v. *Western Electric Co.*, *supra*, 382 F. Supp. at 793 (individual suit).

Aside from promoting finality and foreclosing duplicative suits, application of Rule 23 is also necessary in order to alert the defendant to the scope of the action being brought against it. The defendant in *Holmes* did not yet know "against whom and upon what grounds precisely it must defend" itself a full year and a half after the commencement of the suit. *EEOC* v. *D. H. Holmes Co.*, *supra*, 556 F.2d at 796; *see EEOC* v. *Delaware Trust Co.*, *supra*, 81 F.R.D. at 450-51. Understandably, the EEOC wishes to postpone the necessity of defining the class it represents as long as possible, but Rule 23 does not require identifying every potential class member at the outset of the litigation, and it does not prevent a

redefinition of the class in light of developments during the litigation. See 7 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1760, at 580-83 (1972). The EEOC presumably has a reasonable basis for defining the class it seeks to represent when it commences litigation, because the agency has the benefit of its pre-complaint administrative investigation. There is no justification therefore, for excusing the EEOC from the obligation of advising its adversaries, potential class members, and the trial court of the scope of the class it represents.

### B. EEOC Compliance With Rule 23 Will Protect The Interests Of Aggrieved Individuals By Clarifying The Scope Of The Suit And By Imposing Court Supervision On The Action

EEOC's insistence on filing class actions without Rule 23 certification also prejudices the interests of aggrieved individuals. In particular, the uncertainty generated by EEOC's assertion of the right to maintain a flexible class definition throughout litigation under Section 706[48] may cause some employees to refrain from filing charges or decline to proceed with a lawsuit after receipt of a right to sue letter in the mistaken belief that EEOC is representing their interests. This may result in their claims being barred by time. Section 706(e), (f), 42 U.S.C. § 2000e-5(e), (f).

If non-charging class members choose to file individual charges followed by their own Section 706 lawsuits, they may find that the court will not certify their suit as a class action during[49] or after an EEOC suit encompassing the same class,[50] or will refuse to award any relief that

[48] *See* text at p. 29 *supra*.

[49] *See, e.g.*, Franklin v. General Electric Co., 15 FEP Cas. 1085, 1085-86 (W.D. Va. 1975); Stuart v. Hewlett-Packard Co., 66 F.R.D. 73, 75-77 (E.D. Mich. 1975).

[50] *E.g.*, Walker v. Southwestern Bell Tel. Co., 18 FEP Cas. 1784, 1786 (N.D. Tex. 1978); Garnett v. Mountain States Tel. & Tel. Co., 18 FEP Cas. 1773, 1774 (D. Colo. 1978); Peals v. Southwestern Bell Tel. Co., 18 FEP Cas. 1781, 1782-84 (D. Kan. 1977).



is duplicative of or inconsistent with the result reached in the EEOC action.[51] The effect will be to saddle absent class members with Rule 23's binding effect without any of the safeguards provided by the rule. *See generally* Comment, *supra* note 7, 46 U. CHI. L. REV. at 719-21.

Application of Rule 23 will eliminate any ambiguity concerning who is embraced in the class represented by the EEOC and who remains outside. This will put parties outside the class on notice that, if their interests are to be protected, they must take some action beyond relying on the EEOC. Furthermore, when judgment is entered, Rule 23(c)(3) requires a precise identification of the class. If an individual outside the class files a subsequent private suit, there will no doubt that the individual plaintiff was not a beneficiary of the relief granted in the first suit.

If the EEOC is certified as class representative and, for some reason, a class member is dissatisfied with the EEOC's representation of his interests, the individual may be permitted to intervene in the action. *See* FED. R. CIV. P. 23(d)(2). In addition, class certification brings into play a detailed scheme for judicial control of the litigation designed in part to protect the interests of absent class members and generally "to check possible abuse of the class device." *EEOC* v. *D. H. Holmes Co.*, *supra*, 556 F.2d at 795; *see* FED. R. CIV. P. 23(d), (e). For example, absent class members' interests are protected by the Rule 23 requirement that they be furnished notice of a proposed dismissal or settlement of the action, and that any dismissal or settlement be subject to prior court approval. FED. R. CIV. P. 23(e). Because the full range of interests is more likely to be brought to the court's attention in such a circumstance, the quality of

[51] *See* United States v. City of Jackson, 519 F.2d 1147, 1152 n.10 (5th Cir. 1975); Leisner v. New York Tel. Co., 358 F. Supp. 359, 369-70 (S.D.N.Y. 1973).

relief is likely to be higher than in the case of an unsupervised EEOC settlement outside the Rule 23 context.[52]

### C. Application Of Rule 23 To EEOC Class Actions Will Promote Title VII Enforcement By Encouraging Settlement And Improving The Quality Of Relief Obtained

The certainty of a final and binding judicial decision emanating from a Section 706 class suit instituted by the EEOC enhances the possibility of pretrial settlement of litigation. As the leading treatise on Title VII points out:

> First, defendants would be more likely to settle with the EEOC if the settlement could be a consent decree with a certified class representative, which would have a *res judicata* effect on the class. Next, the desirable feature of finality would attach to a judgment in a litigated case, whether in favor or against the class represented by the EEOC, which would preclude further litigation on the same issues, which is not necessarily the case when the EEOC sues without being certified as a class.

SCHLEI AND GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1106-07 (1976). *See also* Comment, *supra* note 7, 46 U. CHI. L. REV. at 731.

And finally, applying Rule 23 will promote procedural consistency in Title VII litigation. The Fifth Circuit predicted in *Holmes* that "[i]f EEOC is exempted from Rule 23, chaos in the management of Title VII class actions could result. Such matters as notice, exclusion, intervention, dismissal or compromise, and statute of limitations treatment would be put in question." *EEOC* v. *D.H. Holmes Co.*, *supra*, 556 F.2d at 796. The opinion below suggests that trial courts have the discretion on the basis of the broad remedial authority granted by Section 706(g), 42 U.S.C. § 2000e-5(g), to apply procedures comparable to those embodied in Rule 23 without being bound by the strictures of Rule 23. Pet. App. A23-A24. This broad reading of Section 706(g) is unsupported by any authority. But, in any case, the danger in the *ad hoc* approach suggested by the Ninth Circuit is that it provides no standards to guide judges and litigants to ensure that all interested parties, including absent class members, will get the protection they need. As the Ninth Circuit obviously recognized, safeguards such as those in Rule 23 are needed; and the best way to implement those safeguards is to apply the familiar and carefully designed procedures of Rule 23.

[52] *See* Comment, *supra* note 7, 46 U. CHI. L. REV. at 730-31.



### D. The Fact That Rule 23 Has Not Been Applied To Section 707 Pattern Or Practice Suits Does Not Justify The Same Result In EEOC Section 706 Cases

A principal factor in the Ninth Circuit's reasoning was its belief that a uniform practice with respect to the applicability of Rule 23 should be followed in EEOC cases under both Sections 706 and 707. Since no court had applied Rule 23 to Section 707 cases, the court reasoned that the similarities between the two statutes necessitated a uniform result. Pet. App. A18-A21. This reasoning ignores the significant differences between Sections 706 and 707.

Unlike Section 706, only the EEOC may institute Section 707 cases, a power it inherited from the Attorney General in 1972. *See* text at 10. A private party seeking redress against discrimination may sue only under Section 706. *See, e.g., United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 843 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *EEOC* v. *United Air Lines, Inc.*, 515 F.2d 946, 949 (7th Cir. 1975). Furthermore, at least one court has ruled that aggrieved individuals have no right even to intervene in a Section 707 action, *see Allegheny-Ludlum Industries*, *supra*, 517 F.2d at 843-46, a right

which Title VII grants in Section 706 actions brought by the EEOC. *See* Section 706(f)(1), 42 U.S.C. § 2000e-5 (f)(1).

Thus, Section 707 creates a right of action which belongs solely to the EEOC while Section 706 authorizes the agency to sue on behalf of individuals. It is therefore not illogical to hold Rule 23 applicable only to Section 706 class suits, not to Section 707 actions. *See EEOC* v. *D.H. Holmes Co., supra,* 556 F.2d at 792 n.8.

We recognize, however, that a good case still may be made for applying Rule 23 to Section 707. Two commentators have explicitly urged such a construction. *See* Comment, *supra* note 7, 46 U. CHI. L. REV. at 694-96; Bumpass, *supra* note 7, 29 CASE W. RES. L. REV. at 390-94. Their main argument is that it would be incongruous to apply different procedural rules since Section 707(e), 42 U.S..C § 2000e-6(e), directs that "[a]ll . . . actions [under Section 707] . . . shall be conducted in accordance with the procedures set forth" in Section 706. There is ample indication in the legislative history of the 1972 amendments that Congress thought there was little practical difference between Section 706 and 707 once the EEOC was authorized to file actions under both. *See* LEGISLATIVE HISTORY at 1587, 1589. Certainly, the two sections, if not co-extensive, overlap to a large degree. *See International Brotherhood of Teamsters* v. *United States,* 431 U.S 324, 336 & n.16, 357-62 (1977). Applying Rule 23 uniformly to all class suits under Sections 706 and 707 would have the salutary effect of eliminating the danger of duplicative suits for the entire range of EEOC enforcement cases.

This issue, however, need not be resolved in this case since the present suit was filed only under Section 706. Whatever the merits of applying Rule 23 to a future Section 707 case, the case for applying Rule 23 to all Section 706 class actions is compelling.



## CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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